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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent.

v.

SHAWN PARKER,

Appellant

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**RESPONSE BRIEF OF STATE OF WASHINGTON**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iv

INTRODUCTION AND SUMMARY ..... 1

RESPONSE TO ASSIGNMENTS OF ERROR ..... 2

I. Mr. Parker has failed to meet his burden of showing a manifest error related to the search warrant that was unchallenged at the trial court level to allow the issue to be raised for the first time on appeal under RAP 2.5(a)(3).

II. Mr. Parker’s due process rights were not violated by the alleged use of false testimony and/or the state’s alleged failure to correct such false testimony provided by a state’s witness.

III. The restitution order entered in this case was properly entered and supported by admissible evidence consistent with RCW 9.94A.753(3). Mr. Parker’s confusion on appeal, concerning the reasoning of the trial court, stems from the fact that he did not transcribe all of the pertinent hearings in support of his issues.

STATEMENT OF THE CASE ..... 2

I. RELEVANT PROCEDURAL HISTORY ..... 2

II. FACTS RELEVANT TO CLAIM OF PERJURED OR FALSE TESTIMONY ..... 4

III. FACTS RELEVANT TO RESTITUTION ..... 19

STANDARDS OF REVIEW ..... 20

I. RAP 2.5 MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT ..... 20

II. STATE’S USE OF PERJURED OR FALSE TESTIMONY TO OBTAIN A CONVICTION ... 21

III. RCW 9.94A.753(3) – RESTITUTION ..... 21

ARGUMENT .....	22
I.    RAP 2.5 - MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT .....	22
A.    THERE IS NO BASIS IN THE RECORD TO INVALIDATE THE SEARCH WARRANT: .....	25
1.    THE SEARCH WARRANT AND SUPPORTING AFFIDAVIT ARE NOT A PART OF THE RECORD	25
2.    THE APPELLANT CANNOT CARRY HIS BURDEN OF SHOWING THE COURT WOULD HAVE INVALIDATED THE WARRANT IF CHALLENGED BEFORE TRIAL	26
II.    THE STATE DID NOT USE PERJURED OR FALSE TESTIMONY TO OBTAIN A CONVICTION .....	30
III.   THE ORDER OF RESTITUTION ENTERED IN THIS CASE IS SUPPORTED BY THE FACTS AND AUTHORIZED BY STATUTE .....	39
CONCLUSION .....	47
CERTIFICATE OF SERVICE .....	49

## TABLE OF AUTHORITIES

### Washington Cases:

<i>State v. Bertrand</i> .....	22
165 Wn. App. 393, 267 P.3d 511 (Div. II, 2011).	
<i>State v. Davison</i> .....	44, 45
116 Wn.2d 917, 809 P.2d 1374 (1991).	
<i>State v. Hughes</i> .....	45
154 Wn.2d 118, 155, 110 P.3d 192 (2005).	
<i>State v. Kinneman</i> .....	45, 46
155 Wn.2d 272, 119 P.3d 350 (2005).	
<i>State v. Mark</i> .....	45
36 Wn. App. 428, 434, 675 P.2d 1250 (1984).	
<i>State v. McFarland</i> .....	21, 22, 23, 24, 25, 26, 27
127 Wn.2d 322, 899 P.2d 1251, (1995).	
<i>State v. McNearney</i> .....	20, 22, 23, 24
193 Wn. App. 136, 373 P.3d 265, (Div. III, 2016).	
<i>State v. O’Hara</i> .....	24
167 Wn.2d 91, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).	
<i>State v. Pollard</i> .....	46
66 Wn. App. 779, 785, 834 P.2d 51 (1992).	
<i>State v. Riley</i> .....	24
121 Wn.2d 22, 846 P.2d 1365 (1993).	
<i>State v. Scott</i> .....	23
110 Wn.2d 682, 757 P.2d 492 (1988).	
<i>State v. Smith</i> .....	45
119 Wn.2d 385, 831 P.2d 1082 (1992).	

<i>State v. Strine</i> .....	22, 23
176 Wn.2d 742, 293 P.3d 1177 (2013).	
<i>State v. Tobin</i> .....	22, 44
161 Wn.2d 517, 166 P.3d 1167 (2007).	

**Federal Cases:**

<i>Napue v. Illinois</i> .....	34, 36
360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217, (U.S. June 1959).	
<i>Shore v. Warden, Stateville Prison</i> .....	21, 33
942 F.2d 1117, 1122 (7th Cir.1991).	
<i>United States v. Agurs</i> .....	21, 33
427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).	
<i>United States v. Bailey</i> .....	34, 35
123 F.3d 1381, (11th Cir. Fla. September 24, 1997) .	
<i>United States v. Joyner</i> .....	36
201 F.3d 61, 82 (2d Cir. 2000).	
<i>United States v. Michael</i> .....	21, 33
17 F.3d 1383, (11th Cir.1994).	
<i>United States v. Payne</i> .....	35
940 F.2d 286, 291 (8th Cir.1991).	
<i>United States v. Vega</i> .....	21, 36
813 F.3d 386, (1st Cir. P.R. March 2, 2016).	

**Statutes:**

RCW 9.94A.753(3) .....	21, 40, 44
------------------------	------------

**Rules:**

RAP 2.5 .....	20, 23, 24
RAP 2.5(a)(3) .....	20, 23, 24, 26, 29

RAP 16.4(c)(3) .....	26
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## **INTRODUCTION AND SUMMARY:**

The warrant challenged on appeal for the first time is not a part of the record and is thus not susceptible to review. There is no record available for the appellant, Mr. Parker, to point to in support of a finding of a “manifest constitutional error” that would allow the warrant to be challenged for the first time on appeal.

The crux of the constitutional issue at hand is that Detective Horn committed perjury, or at least provided false testimony, and that the state knew of the false testimony and failed to correct the testimony. The cases relied upon by Mr. Parker do not support a finding of perjury or false testimony under the facts of this case and case law. If this Court were to find a violation (Perjury and knowing suppression), the relief requested by Mr. Parker is not appropriate, as he cannot and did not address the probability that the outcome of the trial would have changed.

This Court does not have a full record of the discussions and decision making of the trial court as to restitution, as the appellant has failed to provide a transcript of the sentencing hearing. However, there is a sufficient basis of information found within the transcript of the trial and the restitution hearing to support the trial court’s order of restitution in this case.

**RESPONSES TO ASSIGNMENTS OF ERROR:**

- I. Mr. Parker has failed to meet his burden of showing a manifest error related to the search warrant that was unchallenged at the trial court level to allow the issue to be raised for the first time on appeal under RAP 2.5(a)(3).
  - a. The Search Warrant claimed as an issue on appeal was not challenged at the trial court under a 3.6 suppression hearing;
  - b. The Search Warrant has not been properly made a part of the record under the provisions governing direct appeals, supplementation of the record, or as a personal restraint petition; and
  - c. Any argument concerning what was stated in support of probable cause for issuance of the warrant is speculation and not supported by anything in the record. Claiming perjury at trial and suggesting that the alleged misstatements made at trial translate into reckless fabrications made to obtain a search warrant are not supported.
  
- II. The defendant's due process rights were not violated by the alleged use of false testimony and/or the state's alleged failure to correct such false testimony provided by a state's witness.
  
- III. The restitution order entered in this case was properly entered and supported by admissible evidence consistent with RCW 9.94A.753(3). Mr. Parker's confusion on appeal, concerning the reasoning of the trial court, stems from the fact that he did not transcribe all of the pertinent hearings in support of his issues.

**STATEMENT OF THE CASE:**

**I. RELEVANT PROCEDURAL HISTORY:**

Between the evening of November 5, 2014 and the morning of November 6, 2014, a trailer filled with over \$100,000 in snowmobile gear,

clothing, and accessories belonging to I-90 Motorsports was stolen from their property located in Issaquah, Washington. VRP 25 and VRP 270 - 273. Detective Brian Horn of the Issaquah Police Department received the case on November 10, 2014. He reviewed the initial report submitted by Officer Steele and reviewed additional information including the recovery of the stolen trailer. VRP 62-63.

Detective Horn discussed working with Remko Oosterof (the Manager of I-90 Motorsports and someone Horn had known for years working on other cases) and the Records Lead Ron Hoover to put a list together of missing items. VRP 65 Their work on a list of missing items was reflected in State's Exhibits 1-4, a spreadsheet created to attempt to document as best as possible the missing items and values VRP 68-70. Detective Horn discussed some of the items/issues that were coming to his attention to focus attention upon Shawn Parker in early to mid-December 2014. VRP 64 – 65, 70-71.

Prior to January 7, 2015, the Detective drafted a search warrant based upon information provided by Oosterof and two individuals who had purchased a backpack from Shawn Parker at Cascade Playtime, which item was listed as one of the items stolen in November 2014. VRP 75-76

Trial commenced in this case on April 26, 2016 well over a year after the investigation was wrapped up with the execution of the search warrant. VRP 9. At the time of trial Detective Horn was no longer with the Issaquah Police Department and no longer resided in the state of Washington, having moved to Phoenix Arizona to work for Amazon. VRP 58.

The jury returned their verdict on April 29, 2016, finding Mr. Parker guilty on Count One, Possession of Stolen Property in the First Degree, and guilty on Count Two, Trafficking in Stolen Property in the First Degree. The Jury returned verdicts of not guilty on counts 3 – 7 and did not find the charged aggravators for major economic crimes on any counts under the special verdict forms. VRP 568 – 570. The sentencing hearing was not made a part of the record on appeal, but a restitution hearing was held on July 8, 2016 and made a part of the record. VRP 579 – 592.

**II. FACTS RELEVANT TO CLAIM OF PERJURED OR FALSE TESTIMONY:**

During the course of his investigation, during the month of December 2014, while he was sharing information with the folks at I-90 Motorsports, Detective Horn was told “that they ran a customer...to attempt to buy some products from the business ... and they were able to

buy a “serialized avalanche back pack with cash from Cascade Playtime.

VRP 73. Because the line of questioning and the answers provided by the Detective are necessary for comparison, that exchange is set forth here.

Detective Horn discussed what he learned from the business as follows:

They brought it back and I was immediately sent photos from the business and then they came in, in person to show me the back pack with the serial number that matched the lost list that they already obtained from the business. VRP 73, 17 – 21.

Q. Zempel: So in terms of viewing the backpack, it was brought into you when it was provided back to the business (inaudible)? VRP 73, lines 22-24.

A. Horn: Correct. VRP 73, line 25.

Q. Zempel: And do you recognize that item? Is it present in court today? VRP 74, lines 1-2.

A. Horn: It is. You are holding the item. VRP 74, line 3.

Q. Zempel: And that would be item No. 126? VRP 74, line 4.

A. Horn: Okay. VRP 74, line 5.

Q. Zempel: And in terms of the photographs, did you take those or did the business take those? VRP 74, lines 6-7.

A. Horn: The business took them and sent them to me. They were excited, because they had the actual serial number which then matched the list I already had. VRP 74, lines 8-10.

The inquiry was summed up with a question. VRP 74-75.

Q. Zempel: You received information related to the purchase of the back pack. You had the opportunity to view the back pack yourself. You had the opportunity to compare the serial number with the lost list from I-90 Motorsports. At the conclusion of that what was your next step in the investigation.? VRP 75, lines 8-14

A. Horn: Based on information I now had and my understanding of probable cause for possession of stolen property at the business Cascade Playtime and to include the criminal activity of selling, trafficking and selling property by Mr. Parker. So I drafted a search warrant, I went to the King County Superior Courthouse.... Presented my probable cause statement to Judge Rule and had a search warrant issued for the business, and an arrest warrant issued for Mr. Parker. VRP 75, lines 15-25 and VRP 76, line 1.

After some discussion about next steps in collecting up photos and information from I-90 Motorsports to assist in executing the warrant, Detective Horn was asked about the State's Exhibit 20, which he described as one of the photos he obtained from I-90 Motorsports to assist with the execution of the search warrant. VRP 77.

The Detective was then provided with the State's Exhibit 21 and asked about that picture, as follows:

Q. Zempel: I'm handing you Plaintiff's 21. What are we seeing here? VRP 78, lines 9-10.

A. Horn: This is a picture they had sent me of a serialized serial number of the backpack that was purchased by their customers at the business, Cascade Playtime. VRP 78, lines 11-13.

Detective Horn was then asked about State's exhibits 22-24, which he indicated were pictures provided by I-90 Motorsports related to the types of stolen merchandise, packaging, and branding, that would assist law enforcement in executing the search warrant. Helmets, boxes, and labelling that would help with the search. VRP 78 – 80.

The bulk of Detective Horn's remaining direct examination focused upon the execution of the search warrant, to include a discussion as to the value of items reported stolen being over \$100,000 and of recovering some 380 items with an approximate value of \$41,000 from inside Cascade Playtime (this monetary discussion specifically at VRP 110.).

The cross examination of Detective Horn by Counsel James Kirkham commenced on the second day of trial, April 27, 2016, with a discussion about writing a report in this case, that it was quite some time ago, and that he was no longer within the law enforcement community. VRP 116 (date) and 123. Detective Horn was asked if he recalled everything that was in his report and he replied in the negative. VRP 123, lines 13 -14.

Mr. Kirkham provided Detective Horn defense exhibit 522. VRP 123. Detective Horn was asked to identify the exhibit, which he did as:

That is a supplemental printout of my narrative portion, police report from our CAD system, internal CAD system. VRP 124, lines 3-5. He was asked the standard defense questions about writing the report, if accurate and if anything was wrong or wanted to change, etc. to which he replied:

nothing that jumps out at me ready (really). Again, it's quite sometime ago.

Counsel then focused in on photos from I-90 Motorsports related to an avalanche backpack because they were serialized and the relevance of photos. VRP 128.

Q. Kirkham: Remind me again, what is this a picture of? VRP 128 line 25

A. Horn: This is a picture that was sent to us of a backpack purchased by the witnesses. That have a serial number purchased from Mr. Parker that has a serial number that matches what was purported as taken. VRP 129, lines 1-4.

Q. Kirkham: Okay. And when did you receive this picture? VRP 129 line 5

A. Horn: I do not recall the exact date. It would have been before 28<sup>th</sup> of December.

**The Court interjected to ask the exhibit number.**

Q. Kirkham: Exhibit 21 is what you are referring to as the picture that you received via text, email, however – VRP 129, lines 10-12.

A. Horn: Uh-huh VRP 129, line 13.

Q. Kirkham: - - of the backpack they had bought from Mr. Parker, correct? VRP 129, line 14-15.

A. Horn: Yes, sir. VRP 129, line 16.

Q. Kirkham: Okay. And so is that the only item that actually would have a specific number that wouldn't be mass produced?  
VRP 129, lines 20 - 22.

A. Horn: Well, there was several on the list that did, but that was the only one that was produced at that time, yes. VRP 129, lines 23-25.

Mr. Kirkham did not address any statements from the Search Warrant Affidavit that might have been inconsistent with this testimony, or any information from the Detective's report that might have pointed to this information being inconsistent or incorrect.

A re-direct examination took place. VRP 137 - 148. The prosecution did not bring up the Detectives report, the search warrant, or exhibit 21. A second cross examination took place. VRP 134 - 152.

Counsel inquired concerning the search warrant as follows:

Q. Kirkham: Okay. And you had gotten the warrant on the 31<sup>st</sup>?  
VRP 150, line 4.

A. Horn: I believe that was correct, the 31<sup>st</sup>, yeah. VRP 150, line 5.

Q. Kirkham: And you had been provided the picture, the AVS backpack?  
VRP 150, lines 6-7.

A. Horn: Yes, sir. VRP 150, line 8.

A second re-direct examination followed. VRP 152 - 153. A third cross examination followed. VRP 153 - 155. No questions about the warrant or Exhibit 21 were asked by either counsel.

Arthur Aske was called to testify as one of the two individuals who went to Cascade Playtime to attempt to purchase a serialized back pack or other items that could tie the business to the theft from I-90 Motorsports. VRP 238 -251 Mr. Aske is a patron of I-90 Motorsports and has known Remko Oosterof for over ten years. VRP 239 lines 7 – 18. Mr. Aske has also known Mr. Parker for many years. VRP 239 – 240 Mr. Aske testified that he had heard of the burglary at I-90 Motorsports and had spoken with Mr. Oosterof about going to Cascade Playtime to see if they had any AVS Avalanche Back Packs. Mr. Aske agreed to go and try to purchase such a pack from Mr. Parker and did so about December 22<sup>nd</sup> or 23<sup>rd</sup> of 2014. VRP 240 -241.

Mr. Aske travelled to the area to go snowmobiling with his friend Andrew Hassard. VRP 241. When they arrived at the store, Mr. Aske was looking for the specific type of pack while Andrew was speaking with Shawn Parker. VRP 243- 244. Mr. Aske located the type of pack they were looking for and he brought it to Mr. Hassard to try on. VRP 244.

Mr. Hassard purchased a back pack from Mr. Parker and Mr. Aske identified state's exhibit 126 as the back pack that Mr. Hassard had purchased from Mr. Parker at his store. VRP 246. Mr. Aske indicated that the back pack was in his trailer for a while until they gave it to Mr. Oosterof (testimony that would turn out to be different from the other witness). VRP 246.

Mr. Andrew Hassard was called next to testify. Mr. Hassard also indicated to knowing Mr. Remko Oosterof for over ten plus years. VRP 252. Mr. Hassard testified to being aware of the burglary at I-90 Motorsports and to having a conversation with Mr. Oosterof about going to see if he could buy a particular backpack from Mr. Parker and that Mr. Oosterof would compensate him for the purchase if he was able to buy the pack. VRP 252 – 253.

Mr. Hassard recalled the trip as being after Christmas on the 28<sup>th</sup> of December and that the conversation with Mr. Oosterof took place on December 23 2014. VRP 253 Mr. Hassard confirmed that Mr. Aske had located an AVS back pack and told him to try it on. VRP 257. Mr. Hassard recounted how he came to purchase the back pack from Mr. Parker. VRP 257 – 259.

The two men left with the back pack and went to Salmon La Sac and called Mr. Oosterof. They let him know they had purchased an AVS back pack from Mr. Parker and had a conversation with Mr. Oosterof about locating the serial number, which included exchanging text messages to locate the number. VRP 261 Mr. Oosterof had sent a photograph of a similar back pack during the exchanges so that Mr. Hassard would have some assistance in knowing where to look for the serial number. VRP 262. They were able to match the serial number in the back pack purchased by Mr. Hassard to the list of products stolen that Mr. Oosterof had with him at the store. VRP 261.

Mr. Oosterof told him to hold onto the back pack for the time being. VRP 263. Mr. Hassard indicated that he thought he had the back pack for 2 – 3 weeks, that he would recognize it if shown. VRP 263 Mr. Hassard was shown the back pack and identified it as the back pack that he had purchased from Mr. Parker. VRP 264. Mr. Hassard testified contradictorily to Mr. Aske, indicating that the back pack stayed with him until he provided it to Mr. Oosterof. VRP 264.

On Cross examination, defense counsel emphasized the difference in the testimony between Hassard and Aske as to who had possession of the back pack before getting it to Oosterof. VRP 265 – 266. Defense

counsel also elicited that Mr. Hassard had *sent a picture of the purchased back pack with the serial number to Mr. Oosterof*. VRP 266.

Mr. Oosterof was called next to testify and was able to explain how the list of items that were stolen was put together with the Records Clerk from the Issaquah police department. VRP 281 -283 Mr. Oosterof confirmed asking Art (Aske) about going and purchasing a back pack from Cascade Playtime. VRP 284 – 285. Mr. Oosterof's initial recollection of when the two went to Cascade Playtime was slightly different from that of Aske and Hassard. VRP 286.

Mr. Oosterof confirmed the phone conversation with the two gentlemen after they purchased the back pack and that they were texting information trying to find the serial number. He was provided the serial number of the pack that was purchased from Mr. Parker and confirmed it matched to their inventory of stolen items. VRP 286 – 287.

Mr. Oosterof was shown state's exhibit 21 and indicated that exhibit 21 was not a picture of the stolen backpack (as testified to by Detective Horn) but was a picture that was taken to assist in locating the stolen property and provided to Detective Horn to assist in searching for items during the execution of the search warrant. Mr. Oosterof could not

recall if this particular photo was the one sent to Mr. Hassard to assist in locating the serial number. VRP 287 -288.

In speaking to the possession of the back pack purchased from Mr. Parker, Mr. Oosterof indicated that Mr. Hassard held onto it until the police said he could return it, at which time it was provided to him by Mr. Hassard. Mr. Oosterof was able to identify state's exhibit 126 as the back pack purchased from Mr. Parker and provided to him by Mr. Hassard. VRP 288

Managing to confuse things some more, counsel for the state asked questions that seemed to have the backpack going from Oosterof to Horn, which it did not, and then more confusion over whether the backpack stayed with Mr. Hassard or with Oosterof – but we do know with some certainty that Mr. Oosterof brought it to court with him. VRP 289 – 290. Later in his testimony Mr. Oosterof identified the series of state's exhibits 22 and 23 as also being parts of the photos taken and provided to Detective Horn to assist in the search warrant – photos taken of items that were at I-90 Motorsports. VRP 300.

On cross examination Mr. Oosterof was asked about defense exhibit 521 which was a document prepared and sent to the insurance company concerning the loss due to theft. VRP 303- 304 A discussion of

pricing and profit and the difference between wholesale and retail occurred during re-direct, resulting in explaining how defense counsel had erred in his statements as to potential profit, and the difference between their whole sale price and the retail price being between 30 and 40 percent. VRP 323 – 324.

The third day of trial started with a short defense opening and then the direct examination of the defendant Shawn Parker. VRP 347 – 398

During cross examination the state visited defense exhibit 516 with Mr. Parker. Mr. Parker had some troubles actually identifying the picture and item on cross examination, now not certain whether it was his photo or I-90 Motorsports. VRP 420 - 421 Mr. Parker was also asked about State's exhibit 17 and indicated that he purchased the two back packs in that picture. VRP 422. Then he was asked about defense exhibit 519 which was a photo taken by law enforcement on the day of the search. Mr. Parker claimed he did some research on his lists and the list of stolen items and discovered that he could point to the items in state's exhibit 17 and defense 519 as being helmets on his list but not on the recovered list provided by law enforcement. He then had to admit, on closer inspection that he was wrong about the helmets being the same. VRP 423 – 425.

Detective Horn was called by the defense. The gist of most of the examination was to show deficiencies in the investigation. The specific back pack purchased was not discussed, neither was the warrant affidavit, or exhibit 21 that was mistakenly identified as the purchased back pack during Horn's initial testimony. VRP 435 – 439. The initial cross examination of Detective Horn by the State also did not enter into those areas as that was beyond the scope of defense's direct examination. VRP 439 – 449.

On what amounted to a new line of questioning on re-direct, defense counsel and Detective Horn had the following exchange:

Q. Kirkham: Okay. Now, the backpack that you ultimately -- I believe testified that you got, you booked into evidence; is that correct? VRP 442, lines 24 – 25 and 443, line 1.

A. Horn: No, sir. VRP 443, line 2.

Q. Kirkham: When you first testified, you didn't testify to that? VRP 443, lines 3-4.

A. Horn: That the backpack was booked into evidence? No, sir VRP 443, lines 5-6.

Q. Kirkham: Okay. Did you book anything into evidence? VRP 443, line 7.

A. Horn: No, sir VRP 443, line 8.

Q. Kirkham: So there were no items booked? VRP 443, line 9.

A. Horn: No, they were returned to the business. VRP 443, line 10.

Q. Kirkham: Okay. And the photograph that you received, that backpack that hasn't been admitted, do you know where that's at? VRP 443, lines 11-13.

A. Horn: Of this? The backpack that's in court? VRP 443, line 14.

Q. Kirkham: Correct. VRP 443, line 15.

A. Horn: Correct. No photograph has been taken. VRP 443, line 16.

Q. Kirkham: Okay. But you received the photograph of the backpack? VRP 443, lines 17-18.

A. Horn: I was issued the serial number that matched the list with witness accounts that allowed me to provide for a search warrant. VRP 443, lines 19v- 21.

Q. Kirkham: Okay. Wasn't your testimony the other day that you received a photograph of the backpack? VRP 443, lines 22 - 23.

A. Horn: The photograph I received that I was referring to was the photograph of the description of where the sealed tags are in orange picture, picture of the orange backpack. VRP 443, lines 24 – 25 and 444, lines 1 – 2.

Q. Kirkham: Okay. So you never actually got the photographs that Mr. Hassard or Mr. – or the other gentleman sent over; is that correct? VRP 444, lines 3 – 5

A. Horn: Correct, sir. VRP 444, line 6.

Q. Kirkham: Okay. So Remko never provided that to you? VRP 444, line 7.

A. Horn: He didn't. I do not believe so. VRP 444, line 8.

Q. Kirkham: Okay. Okay. And did you ever receive the backpack? VRP 444, line 9.

A. Horn: No, sir. VRP 444, line 10.

Q. Kirkham: Okay. Up until – from the time you got involved up until court, you'd never seen that backpack? VRP 444, lines 11 - 12.

A. Horn: No, I had requested they keep it in their possession, if needed, it was their property. VRP 444, lines 13 - 14.

This testimony as a witness for the defense, and the alleged differences between Detective Horn's testimony for the state, is what Mr. Parker points to in support of his claim of perjured testimony or false testimony, elicited or used by the state in its case against Mr. Parker.

A review of the State's closing arguments, reveals that the State did not mention any possible confusion involving Horn and exhibit 21 or the possibility that his testimony was different in some manner during his two trips to the witness stand, but did mention some minor differences between Hassard and Aske.

During Mr. Parker's closing argument, a telling statement was made by counsel, that puts in context his perception of the testimony:

I've had this case, Mr. Zempel's had this case. And you can see how much we have struggled with trying to figure out, okay, are

we talking about this back pack or that back pack? At one point in time the officer or former officer identified the orange backpack as the one that had been purchased at my client's shop. VRP 527, lines 14 – 20.

Counsel then continued to attempt to cast doubt upon the evidence as follows:

We still don't have the picture that the guys you say they went up there, supposedly set, and then it was given to the former officer. You remember that testimony? Where is that picture? He's not in evidence. The backpack that was purchased from Mr. Parker's shop and then sat in the trailer. According to one witness it went to a house and then back into the trailer according to another one it didn't ever go into anybody's house it was just in the trailer. And then finally at some point it was given to Remko and then Remko finally brought it here. VRP 527 lines 21 – 25 and VRP 528 lines 1 - 7.

### **III. FACTS RELEVANT TO RESTITUTION:**

It is clear from the record that a sentencing hearing took place on June 10, 2016. Mr. Parker, however, made a decision not to have the sentencing hearing transcribed for the record. It is clear that restitution was discussed at the sentencing hearing, given the statements during the restitution hearing that was transcribed, and that the proposed order was based in part upon the court's statement at the time of sentencing and utilizing a specific exhibit from trial as the starting point for reaching an amount. VRP 581 – 582

Counsel for Mr. Parker also, while indicating the amount looked probably pretty accurate, claimed to still not know how they arrived at that figure. VRP 583. The actual documents used to derive the numbers were attached to the restitution order. VRP 583.

#### **STANDARDS OF REVIEW:**

##### **I. RAP 2.5 - MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT:**

A party may not assert on appeal a claim that was not first raised at the trial court. *State v. McNearney*, 193 Wn. App. 136, 373 P.3d (Div. III, 2016). The constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below. *State v. McNearney*, 193 Wn. App. 136, 373 P.3d 265 (Div. III, 2016).

An error is considered manifest when there is actual prejudice. The focus of this analysis is on whether the error is so obvious in the record as to warrant appellate review. *State v. McNearney*, 193 Wn. App. 136, 373 P.3d 265, (Div. III, 2016).

If the facts necessary to adjudicate a claimed error under RAP 2.5 are not in the record on appeal, no actual prejudice is shown and the error

is not manifest. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

## **II. STATE’S USE OF PERJURED OR FALSE TESTIMONY TO OBTAIN A CONVICTION:**

A “conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (footnote omitted). Only the knowing use of false testimony constitutes a due process violation. *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir.1994). *Shore v. Warden, Stateville Prison*, 942 F.2d 1117, 1122 (7th Cir.1991).

Conflicting testimony between witnesses does not create a *Napue* claim because even if a witness's testimony contains falsehoods, cross-examination and jury instructions regarding witness credibility will normally purge the taint of false testimony. *United States v. Vega*, 813 F.3d 386, (1st Cir. P.R. March 2, 2016).

## **III. RCW 9.94A.753(3) - RESTITUTION:**

Trial courts have broad discretion in entering orders of restitution, and an order of restitution will be allowed to stand on appeal absent a showing by the appellant that an abuse of discretion took place. A trial

court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

## **ARGUMENT**

Mr. Parker, for the first time on appeal, seeks to challenge the search warrant issued in this case that led to the collection of physical evidence used to convict him at trial. Mr. Parker, for the first time on appeal contends that Detective Horn perjured himself during his testimony and the state was aware of the perjury and did not take steps to address the perjured testimony, requiring a reversal of the convictions and a remand for new proceedings. Mr. Parker alleges that the trial court abused its discretion in determining an award of restitution, and seeks remand for a new hearing if the convictions are affirmed.

### **I. RAP 2.5 - MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT:**

There is clear and consistent history in Washington of disallowing a party to assert on appeal claims that were not first raised at the trial court. *State v. McNearney*, 193 Wn. App. 136, 373 P.3d 265, (Div. III, 2016); *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013); *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (Div. II, 2011); *State v.*

*McFarland*, 127 Wn.2d 322, 899 P.2d 1251, (1995). See RAP 2.5(a).

The rule is intended to allow trial courts an opportunity to rule correctly on a matter before it can be presented on appeal, and to prevent potential abuse of the appellate process, including the goal of ensuring a complete record of the issues will be available to the appellate courts. *Strine* at 749-750.

An exception to the general rule may be found in RAP 2.5(a)(3), if an appellant can demonstrate a manifest error affecting a constitutional right. In order to avail oneself of the exception, an appellant must demonstrate the error is manifest, and the error is truly of constitutional dimension. *State v. McNearney*, 193 Wn. App. at 141; *State v. McFarland*, 127 Wn.2d at 333.

The constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below. *State v. McNearney*, 193 Wn. App. at 142; *State v. McFarland*, 127 Wn.2d at 333; *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). For an error to be considered manifest, there must be shown an actual prejudice from the error, and the error must be so obvious on the record to warrant appellate

review. *State v. McNearney*, 193 Wn. App. at 142; *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

An appellant must show how, in the context of a trial, the error actually affected his/her rights. *State v. McFarland*, 127 Wn.2d at 333. An appellant can demonstrate actual prejudice by making a plausible showing that the asserted error had practical and identifiable consequences in the trial. *State v. McNearney*, 193 Wn. App. at 142. In determining whether there were practical and identifiable consequences, the appellate court must look at the issue from the trial court's perspective, given what they knew at that time, and consider whether the court could have corrected the error. *State v. McNearney*, 193 Wn. App. at 142.

These decisions are driven by the record on appeal, and if the facts necessary to adjudicate a claimed error under *RAP 2.5* are not in the record on appeal, no actual prejudice can be shown and the error will not be considered manifest. *State v. McFarland*, 127 Wn.2d at 333; *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). When the record is incomplete because counsel did not take an action, the burden upon the appellant is to show that the trial court likely would have granted a motion if counsel had made the motion/requested action. *State v. McFarland*, 127 Wn.2d at 333. The burden is upon the appellant to do more than

allege prejudice, they must demonstrate actual prejudice or the error will not be considered manifest and review will not be available under RAP 2.5(a)(3). State v. McFarland, 127 Wn.2d 333-34.

**A. THERE IS NO BASIS IN THE RECORD TO INVALIDATE THE SEARCH WARRANT:**

**1. THE SEARCH WARRANT AND SUPPORTING AFFIDAVIT ARE NOT A PART OF THE RECORD AND THE COURT CANNOT PRESUME TO CREATE FACTS THAT DO NOT EXIST.**

There is no record indicating that the search warrant issued during the investigation of Mr. Parker was challenged during the course of proceedings below. Mr. Parker has not raised as an issue, ineffective assistance of counsel for not challenging the search warrant at the trial court level. Rather Mr. Parker argues that Detective Horn's "perjured" testimony at trial supports this Court in presuming that regardless of what the affidavit actually said, it either contained:

Willful or reckless untrue information provided by Horn; or that Horn relied upon information from civilians that would not support a finding of probable cause for the issuance of the warrant.

Mr. Parker has not and cannot fulfill his burden of showing a manifest error affecting a constitutional right in this case because he has not made the affidavit and warrant authored by Horn and granted by a

judge a part of the record. And while Mr. Parker would like this Court to make presumptions about the warrant, that is not allowed under our case law. Mr. Parker, like the defendants in *McFarland*, had the ability under RAP 16.4(c)(3) to concurrently file a Personal Restraint Petition with this appeal. The absence in the record of what the affidavit from Horn said, makes the issue of “manifest error” unsupported. Because the issue is not supported by the record, the error is not manifest and is therefore not reviewable under RAP 2.5(a)(3).

**2. THE APPELLANT CANNOT CARRY HIS BURDEN IN SHOWING THE COURT WOULD HAVE INVALIDATED THE WARRANT IF CHALLENGED BEFORE TRIAL.**

Mr. Parker has the burden, not of alleging prejudice, but in demonstrating actual prejudice because trial counsel did not challenge the search warrant issued in this case. If he cannot show actual prejudice the alleged error is not manifest and review under *RAP 2.5(a)(3)* is not available. The Court in *McFarland* noted that the defendants had a predicament because they had the burden of showing on the record that a motion if brought likely would have been granted, but they could not do that because the record was not developed in a fashion to allow such a showing. That is this case: The record is not sufficiently developed to allow Mr. Parker to carry his burden.

Mr. Parker alleges, but does not and cannot show that the affidavit submitted by Detective Horn lacked a sufficient basis in support of probable cause, or that it contained statements that were willfully or recklessly untrue. As noted above, when looking at issues raised for the first time on appeal, this Court must put itself in the shoes of the trial court and assess the issue based upon what was known by the trial court at the time an issue could have been raised. The proper mechanism to address the validity of a search warrant would have been to conduct a suppression hearing in advance of trial. At such a hearing, the basis for contesting a lack of probable cause would be a review of the facts contained in the affidavit – facts that were known at the time of drafting the affidavit.

In *McFarland*, in what was ostensibly dicta, given the holding, the Court did consider what facts might have been considered by the Court had a motion been made. Our problem is that Mr. Parker attempts to extrapolate testimony from trial which he characterizes as “perjury” to a hearing that would have been held in advance of trial based upon the four corners of the affidavit.

What is clear from the record is that Detective Horn oversaw an investigation into the theft of property. Horn was dealing with an identified civilian witness whom he had known for many years and whom

he had worked on cases in the past (Oosterof). It is also clear that Oosterof was working with other identified civilian witnesses who were known to Oosterof for a long period of time, and that they agreed to assist in obtaining information and evidence from Mr. Parker (Aske and Hassard). There was nothing illegal about them travelling to Mr. Parker's store to inquire about specific back packs. There was nothing illegal in their purchasing such a back pack. There was nothing illegal in their locating a serial number in/on the back pack and providing that information to Oosterof. There was nothing illegal in Oosterof searching his records to compare that serial number with items stolen. There was nothing illegal in Oosterof or law enforcement having the witness(es) hold onto the back pack until they could provide that to Oosterof. There was nothing illegal about law enforcement allowing a property owner to retain property pending trial and to bring the item to trial for use as evidence.

The discrepancy in the Detective's testimony is whether he saw a photo of the back pack and/or saw the back pack personally before trial, or whether he incorrectly identified one photo as being a photo of that particular back pack and misstated seeing the back pack and or photo of same before drafting his warrant. And we must remember, that at the time of trial, Detective Horn was almost 18 months removed from his

investigation and was no longer in law enforcement as he came to testify about the case and his memory.

If we are to assume (and that is all that Mr. Parker can request us all to do given the lack of evidence in the record) that the affidavit was written closer in time to the investigation, and might have been more accurate, can we assume that a correct version of events would have been transcribed? Even after the different testimony from the various witnesses, we know that a photo was taken of the back pack and forwarded to Oosterof – but we do not know for certain that it was shared with Detective Horn. It would appear from the testimony of three witnesses that it was unlikely that Detective Horn saw the back pack before drafting the search warrant, but it is likely that he saw it before trial as he identified it in court.

Because the record does not support a finding of a manifest constitutional error, this court should deny review of the issue under RAP 2.5(a)(3). This Court should also not entertain a remand for additional proceedings given that based upon the facts that are present in the record, the Mr. Parker cannot carry his burden on suppression. Mr. Parker has alleged facts that have not been proven in the record. Mr. Parker has alleged prejudice but has not carried his burden. The requested review

and relief based upon consideration of the issuance of the warrant should be denied. There is an insufficient basis to find that the warrant issued in this case was not properly supported by probable cause.

**II. THE STATE DID NOT USE PERJURED OR FALSE TESTIMONY TO OBTAIN A CONVICTION:**

Mr. Parker has chosen to classify discrepancies in a witness' testimony as perjury or false testimony. Mr. Parker has further chosen to argue that the state was aware that the witness perjured himself and took no steps to correct the false testimony. These are strong statements that are not supported by the facts or the law.

A review of the record would support an interpretation that Detective Horn provided conflicting testimony on two different days. A review of the record would support an interpretation that there were differences in how the various witnesses recalled the events surrounding the investigation in this case, when they testified almost a year and a half after the investigation was completed.

A review of the specific testimony of Detective Horn, in the context of questions asked would suggest that Counsel for the state probably interjected some of the confusion through questions and summary of answers that were incorrect. And a review of the questions

asked by Counsel for Mr. Parker would suggest that they had realized an issue with his testimony and a possible angle for scoring points on cross-examination before the state had realized an issue existed. And, given the way that cross-examination when the Detective was a state's witness, versus direct examination when called by the defense, would suggest that their interpretation of his testimony led them to believe that they had some discrepancies in his testimony that they could use to show confusion to the jury about the investigation and/or testimony – which they did.

There is nothing in the record to suggest that the State did not provide to the defendant every piece of information known and collected during the investigation. There is nothing in the record to suggest that the State was not forthright in providing all of the information known to the state to defense, and that they continued to provide such information when asked, seeking to obtain information that was not known.

The record would reflect that this was a somewhat complex case with 133 exhibits marked by the state with 4 not admitted, and 23 exhibits marked by defense with 21 admitted. VRP 14. Counsel for Mr. Parker, during closing argument, provided his take on the confusion that he perceived as existing with the case – confusion as opposed to perjury or false testimony:

I've had this case, Mr. Zempel's had this case. And you can see how much we have struggled with trying to figure out, okay, are we talking about this back pack or that back pack? At one point in time the officer or former officer identified the orange backpack as the one that had been purchased at my client's shop. VRP 527, lines 14 – 20.

Counsel then continued to attempt to cast doubt upon the evidence as follows:

We still don't have the picture that the guys you say they went up there, supposedly set, and then it was given to the former officer. You remember that testimony? Where is that picture? He's not in evidence. The backpack that was purchased from Mr. Parker's shop and then sat in the trailer. According to one witness it went to a house and then back into the trailer according to another one it didn't ever go into anybody's house it was just in the trailer. And then finally at some point it was given to Remko and then Remko finally brought it here. VRP 527 lines 21 – 25 and VRP 528 lines 1 - 7.

It was also clear that the State's witnesses were not the only witnesses with some problems in getting their testimony correct. The State was able to determine that Mr. Parker made mistakes as he was identifying exhibits and testifying as to what the information meant or did not mean, and was able to get Mr. Parker to agree that he was incorrect on several of his statements made during direct examination, as it related to items of evidence (the state is not alleging he committed perjury). VRP 420 – 425.

The State strongly disagrees with the characterization of the facts in this case by Mr. Parker. The State does not believe that the record supports a finding that Detective Horn perjured himself. The State does not believe that the record supports a finding that Detective Horn knowingly provided false testimony. And the State does not believe that the record supports a finding that the State was aware that Detective Horn perjured himself or provided false testimony and chose to ignore such falsity in an effort to obtain a conviction.

The State would concur in the statement of the law put forth by Mr. Parker that the knowing use of perjured testimony to obtain a conviction is fundamentally unfair, and that such use should lead to the conviction being set aside if there is a reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (footnote omitted).

The law requires, however, the knowing use of false testimony by the state in order to rise to the level of a due process violation. *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir.1994); *Shore v. Warden, Stateville Prison*, 942 F.2d 1117, 1122 (7th Cir.1991). The State is cognizant of its obligation not to allow false testimony to be provided to

the jury, and recognizes the obligation to correct false testimony when it becomes known to the prosecution. *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217, (U.S. June 1959).

To obtain a reversal on the grounds that the government relied on perjured testimony, the following must be shown: (1) the contested statements were actually false, (2) the statements were material, and (3) the prosecution knew that they were false. *United States v. Bailey*, 123 F.3d 1381, (11th Cir. Fla. September 24, 1997) .

The contested statements in this case, it appears to be alleged, are that:

1. Detective Horn saw a picture of the back pack that was purchased from Mr. Parker by Aske and Hassard before obtaining a search warrant (and that picture was represented in Plaintiff's Exhibit 21); and
2. Detective Horn personally saw the back pack that was purchased by Aske and Hassard before applying for the search warrant.

It is not entirely clear whether Detective Horn's statement about seeing a photo of the back pack or his statement about not seeing a photo of the back pack is correct, given that during the second questioning he was providing his recollection of what he recalled as well as what he thought he testified to. The testimony of three (3) witnesses confirm that a photo of the back pack purchased from Mr. Parker was taken, and was

provided to Oosterof. Oosterof could not recall if he shared that photo with the Detective, and the Detective's testimony on this point created a conflict to argue to the jury and to allege perjury on appeal.

The other interesting piece to the confusion is that when the Detective was testifying about state's exhibits 21 – 24, he correctly identified 22 – 24 as relating to photographs provided by I-90 Motorsports to assist in the search warrant. Perhaps the confusion was the expectation created by the State's questioning before showing the Detective the back pack and the photo of a back pack for identification. Perhaps it was a Detective anticipating where the state was going and making an error. Perhaps it was the state anticipating where it was going and becoming confused by the response, or which piece of evidence they were showing the detective and why.

What does seem clear is that the contradictions as to the photo do not rise to the level of perjury. Case law is clear that perjury is not established by the fact that testimony is challenged by another witness or is inconsistent with prior statements - not every contradiction in fact or argument is material. *United States v. Bailey*, 123 F.3d 1381, (11th Cir. Fla. September 24, 1997). *United States v. Payne*, 940 F.2d 286, 291 (8th Cir.1991).

And it is clear that the mere fact that conflicting testimony between witnesses exists does not create a *Napue* claim. And this is true, even if a witness's testimony contains falsehoods, because the trial process, involving cross-examination and jury instructions regarding witness credibility addresses these issues and provides for the ability to "purge the taint of false testimony." *United States v. Vega*, 813 F.3d 386, (1st Cir. P.R. March 2, 2016); *United States v. Joyner*, 201 F.3d 61, 82 (2d Cir. 2000).

The other facet of the law, relative to "false testimony" is that there are obligations upon defense to correct the falsity or be deemed to waive the claim. In a case where a defendant has actual knowledge of false testimony, and they fail to correct the testimony, the courts will assume that this was done for strategic reasons and will consider any *Napue* claim waived. *United States v. Vega*, 813 F.3d 386, (1st Cir. P.R. March 2, 2016).

The question of whether the Detective's testimony concerning the photograph was false is not as clear as Mr. Parker claims. And, Counsel for defendant certainly had the opportunity to cross examine the Detective on multiple occasions, was able to use the perception of confused

testimony in closing argument, and had the benefit of jury instructions that addressed the credibility of witnesses.

A similar walk through of the testimony concerning the back pack and when it was seen by Detective Horn yields a similar result. It would appear that his testimony was conflicting as to when he saw the back pack – before the search warrant or at some later time before trial. There was confusion amongst all of the witnesses as to the timing of events. This confusion was confounded by defense questions/assumptions, that the Detective had taken the item into evidence – which he had not, but which was clearly the assumption of defense counsel during cross examination. It is also clear that the Detective had seen the back pack at some point in time prior to trial, and was able to identify the back pack during trial VRP 74 – and those facts were not contested by Counsel during questioning or during closing arguments.

The other issue is the materiality of the testimony during trial. The back pack was an important item, but how important to a jury was the timing as to when or whether Detective Horn saw a photo of the back pack purchased from Mr. Parker? How important to a jury was the timing as to when or whether Detective Horn personally saw the back pack?

Hassard and Aske testified to purchasing the back pack from Mr. Parker. They testified to contacting Mr. Oosterof to compare serial numbers. They testified to sending Mr. Oosterof a picture of the back pack that they purchased. They testified, and Mr. Oosterof testified that they were able to match the serial number from the purchased back pack with the item on their stolen inventory list. They all testified to the back pack being in their custody (either Aske's or Hassard's custody – then to Oosterof) and being produced at trial. No testimony or cross examination rebutted these facts.

It is clear that the jury did a good job of weighing and considering the evidence presented, that they listened to the arguments of Counsel (including the defense attacks on credibility based upon the alleged discrepancies). And it is clear that the jury in weighing the evidence agreed to findings of guilt as to some charges, but not all charges.

The record does not support a finding that Detective Horn perjured himself or provided false testimony. While the evidence allows for the argument that there were discrepancies in testimony, it does not allow for the argument that the burden of proving perjury has been met. And there is nothing in the record to suggest that the State had any indication that Detective Horn provided perjured or false testimony. It is clear from the

record that the State, after defense brought the issue forward, attempted to also try to clear up confusion. Nothing in the record, however, suggests any finding that the State was hiding evidence or not producing evidence, or knowingly allowing false testimony in violation of the string of cases cited by Mr. Parker:

Because Mr. Parker has not met his burden in demonstrating a due process violation through the use of perjured or false testimony, his requested relief to overturn the convictions in this case should be denied. The testimony did not rise to the level of perjury in that it was not definitively false; it was not material; and the State was not aware of the falsity of the testimony at the time it was presented.

**III. THE ORDER OF RESTITUTION ENTERED  
IN THIS CASE IS SUPPORTED BY THE  
FACTS AND AUTHORIZED BY STATUTE:**

Mr. Parker claims that the primary problem with the restitution order in this case is that the record supporting the amount ordered is not clear, pointing to CP 191, which is an Amended Order of Restitution (A document that is reflected by the Designation of Clerk's Papers as being filed on July 14, 2016 – CP 190 - 192).

Counsel states in his brief that:

“On its face (Assuming he is speaking to CP 190 -192) it provides for 23 thousand to the insurance company, where exactly this figure came from is not clear. 10 thousand for the deductible, to which defense counsel noted his objection. RP at 582. The basis for the objection was that the deductible was for the entire amount of the items taken from I-90, and was not prorated for just the items found in Mr. Parker’s possession. Id. Further, there is no indication that there was an offset for the recovered items that supposedly belonged to I-90. There was testimony at trial that I-90 was still in possession of those items. RP at 310.

A review of the Amended Order of Restitution, CP 190 – 192, reflects an amount of \$23,571.93 to the insurance company, \$10,000.00 to I-90 Motor Sports to cover their deductible, and Lost Profit also awarded to I-90 Motor Sports in the amount of \$9,428.77.

Mr. Parker quotes from RCW 9.94A.753(3) as his only legal authority. Counsel then asserts that lost profits are not one of the approved categories for restitution in property cases, where compensation is limited to injury or loss of property. (Without citation to authority). Counsel then opines that lost profits also seem to fit in the category of “intangible losses.”

As to the issue of restitution, we are again faced with missing or mislabeled documents as well as missing portions of the record that are pertinent to review. Counsel points to one document and a portion of a

transcript of a restitution hearing held July 8, 2016, and claims that he is confused as to where in the record the decision of the trial court comes from – perhaps that is because he has not provided a complete record.

Within the Designation of Clerk’s Papers is the Amended Order of Restitution, CP 190 -192. The Judgement and Sentence was entered in this case on June 10, 2016. CP 146 – 157. A review of the Judgment and Sentence would reflect that the Court set a restitution hearing for July 8, 2016 at 9:00a.m. CP 146 – 157. Perhaps a review of a transcript of those proceedings (June 10, 2016 sentencing hearing and possibly a hearing on May 23, 2016 that was unproductive) might be worth some review (*if the hearings had been transcribed*).

The Designation of Clerk’s Papers reflects an Order Setting Restitution as having been entered on July 8, 2016. CP 158-173. Perhaps a review of that document which actually correlates to being entered at the hearing on July 8, 2016 and transcribed by Mr. Parker (VRP 579 – 593) might be enlightening. The Amended Order Setting Restitution referenced by Mr. Parker in his argument, CP 190 – 192, reflects a date of filing as July 14, 2016. It might be worth reviewing the transcript of the proceedings on that date, if such proceedings occurred with entry of that order (*no transcription of such a hearing is found in the record*).

Mr. Parker's argument does not reference the Order of Restitution CP 158-173, entered on July 8, 2016 when comparing it with the testimony of the hearing that was transcribed. Rather he compares the testimony from that date with the Amended Order of Restitution CP 190 – 192. The record is clear that an order on restitution was entered on July 8, 2016. VRP 586. The record is also clear that the Order of Restitution entered on that date was somewhat lengthy. CP 158 – 173.

The reason that a transcript of the sentencing hearing might be helpful is the dialogue at the restitution hearing (VRP 581 – 583):

Mr. Zempel: This restitution order is proposed based upon the court's statements at the time of sentencing, where if I recall correctly, and I touched bases briefly with counsel on our recollection. You had indicated a desire to utilize the previous one exhibit; allow for the deductible and allow for the testimony related to lost profit. So in terms of that order, it takes that number as in lost profit. And it provides for the (inaudible).

The Court: Great. Okay. Mr. Kirkham, this restitution order Mr. Zempel prepared, do you have any objections to it?

Mr. Kirkham: Judge, I think it comports in spirit with your previous order with regards to restitution. I guess part of my issue would be that the deductible covers everything, not just the portion that would be attributable to Mr. Parker under –

On the issue of the numbers and how they were derived, there is reference to a document that was used at sentencing, and then that

document was referenced and apparently made a part of the record (VRP 583). A full review of the record and the documents that have been designated as Clerk's Paper's would reflect that I-90 suffered claimed losses in the neighborhood of \$113,000.

After at least two hearings concerning restitution, and much testimony and discussion concerning exhibits and damages at trial, the trial court judge exercised his discretion and entered an order that appears to have considered the arguments of counsel – only \$23,571.93 to the insurance company (presumably based upon some setoffs); \$10,000.00 for the deductible that by I-90 Motor Sports would be out before a recovery from the insurance company. VRP 584). Additional clarification is provided in discussing the award of lost profits in comparison to the document that was utilized by the Court in reaching their decision as to what to award relative to this loss. VRP 583 – 585. (See CP 158 – 173 as the document referenced for determination is actually attached to the Order of Restitution) Of note, there was a discussion about what was not factored in or left out, and trial counsel indicated they were satisfied. VRP 585

It is clear that trial courts have broad discretion in entering orders of restitution, and that an order of restitution will be allowed to stand on

appeal absent a showing by the appellant that an abuse of discretion took place. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). The relevant portions of RCW 9.94A.753 provide that restitution “shall be based on easily ascertainable damages for injury to or loss of property,” and “[t]he amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.” RCW 9.94A.753(3). *State v. Tobin*, 161 Wn.2d at 523. The plain language of the restitution statute allows the trial judge to order restitution ranging from zero in extraordinary circumstances, up to double the offender's gain or the victim's loss. *State v. Tobin*, 161 Wn.2d at 523.

When interpreting Washington's restitution statutes, we recognize that they were intended to require the defendant to face the consequences of his or her criminal conduct. *State v. Davison*, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991). We do not engage in overly technical construction that would permit the defendant to escape from just punishment. *Id.* The legislature intended “to grant broad powers of restitution” to the trial court. *Id.* at 920. *State v. Tobin*, 161 Wn.2d at 524.

There must be a causal connection between the damages claimed and the crime charged. The Court of Appeals has required only a determination that “but for” the crime, the damages would not have

occurred, and we have made it clear that foreseeability is not required. In application, we have approved restitution orders that cover investigative costs and ascertainable environmental costs, in part because public costs are included in the definition of restitution. *State v. Tobin*, 161 Wn.2d at 526-527.

The Court in *Tobin* went on to list the types of examples of restitution that have been awarded to include (with case citations as referenced):

Investigative costs; *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005)

Costs incurred by a bank to unload surveillance film, to purchase new film, and to reload bank surveillance cameras; *State v. Smith*, 119 Wn.2d 385, 388, 831 P.2d 1082 (1992).

The amount that a city paid an assault victim during the time that he was unable to work as a result of the assault. *State v. Davison*, 116 Wn.2d 917, 921-22, 809 P.2d 1374 (1991).

In *State v. Hughes*, 154 Wn.2d 118, 155, 110 P.3d 192 (2005) where the crime involved a loss of environmental resources, we affirmed a restitution order that included the real ecological value, rather than simply market value, of stolen old growth trees.

The Courts have made it clear that restitution includes components that are both punitive and compensatory. *State v. Kinneman*, 155 Wn.2d 272, 279 - 80, 119 P.3d 350 (2005). “[F]unds expended by a victim as a

direct result of [a] crime . . . can be a loss of property on which restitution is based.” *State v. Kinneman*, 155 Wn.2d 272, 287, 119 P.3d 350 (2005).

Once the State establishes the fact of damage, “the *amount* need not be shown with mathematical certainty.” *State v. Mark*, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984). While certainty of damages need not be proved with specific accuracy, the evidence must be sufficient to provide a reasonable basis for estimating loss. *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51 (1992).

Contrary to the assertions of Mr. Parker, and despite his failure to capture all of the relevant portions of the record, there is sufficient evidence to support the exercise of discretion by the trial court in this case. The trial court listened to the testimony that was uncontested as to the process of how the businesses involved in this case operated, what their typical profit margins were, and the fact that I-90 Motor Sports was packed up and ready to head to a show the day following the thefts. The trial court weighed the evidence as to the total losses incurred by I-90 Motor Sports and factored in a reduction using its discretion.

Contrary to the assertions of Mr. Parker, the trial court correctly applied the restitution statute and case law and made a reasoned decision

as to an appropriate amount of restitution, taking into consideration both the punitive and compensatory nature of the statute. The losses and dollar figures assigned for restitution to both the insurance company and I-90 Motor Sports were reasonably and rationally related to, and were suffered as a consequence, of the crimes for which Mr. Parker was found guilty. This Court should not disturb the ruling of the trial court as to restitution, as the trial court did not abuse its broad discretion.

**CONCLUSION:**

A quote involving a response to a brief that contained little legal analysis but many fancy and large words has stayed with me over the years, and is as follows:

“While Appellant seems to have successfully fed a thesaurus into a Salad Shooter, there is still no indication of authority for the position asserted.”

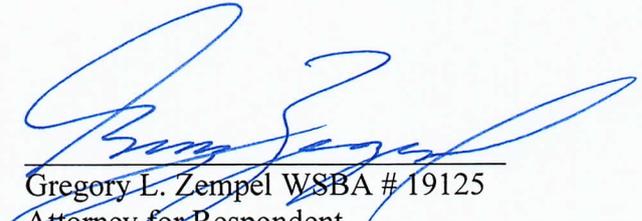
Mr. Parker’s brief takes a similar tact, but rather than using large words, he simply has grabbed the leading cases on prosecutorial misconduct, claimed perjury was committed and ignored by the state, and demands that his conviction be overturned.

Because the record is incomplete and does not allow for proper review of a manifest error, this Court should deny the relief requested and

uphold Mr. Parker's convictions. Mr. Parker ask this Court to assume that because of the contradictions in Detective Horn's trial testimony, it must be true that he willfully or recklessly provided false information in his affidavit for a warrant. This is a request not supported by the facts or the law.

Because the restitution order was based upon an exercise of sound discretion, grounded in the evidence presented, and causally and reasonably related to the crimes committed, the order of restitution should be upheld. Mr. Parker's failure to generate a sufficient record on review should not be allowed to support his argument that the record is not sufficient to support the restitution order entered.

Respectfully submitted this the 17 day of July, 2019.



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PROOF OF SERVICE

I, Gregory L. Zempel, do hereby certify under penalty of perjury that on 17th day of July, 2019, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Response Brief:

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**KITTITAS COUNTY PROSECUTOR'S OFFICE**

**July 17, 2019 - 3:31 PM**

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**Appellate Court Case Title:** State of Washington v. Shawn Samuel Parker  
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