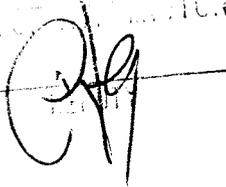


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STATE OF WASHINGTON

BY



No. 31636-6-II (Consolidated with No. ³¹⁶⁴⁶⁻³~~31858-0-II~~)
IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent

v.

DOUGLAS JOHN MARTIN TOBIN
Appellant

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause Nos. 02-05810-0 & 02-01236-3
The Honorable John McCarthy, Presiding Judge

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ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR	1
II. ISSUES PRESENTED	
1. Whether the Court erred in awarding restitution based on legally insufficient Declarations which failed to meet the mandatory requirements of RCW 9A.75.085?.....	1
2. Whether the Court erred in ordering restitution in the amounts requested by the State because such amounts were not ascertained with reasonable certainty?.....	1
3. Whether the Court erred in awarding the State its investigative and administrative costs because such costs were not sufficiently related to the crimes to which Mr. Tobin plead guilty?	1-2
4. Whether the Court erred in awarding the State restitution for sovereign Indian tribes' shellfish harvest losses for which the State is not a victim?	2
III. STATEMENT OF THE CASE	
A. Procedural Background& Factual Background	1
IV. ARGUMENT	
I. The Court erred in awarding restitution based on legally insufficient Declarations which failed to meet the mandatory requirements of RCW 9A.75.085	3
II. The Court Erred In Ordering Restitution In The Amounts Requested By The State Because Such Amounts Were Not Ascertained With Reasonable Certainty	5
III. The Court Erred In Awarding The State Its Investigative And Administrative Costs Because Such Costs Were Not Sufficiently Related To The Crimes To Which Mr. Tobin Plead Guilty	11

IV. The Court Erred In Awarding The State Restitution For Sovereign Indian Tribes Shellfish Harvest Losses For Which The State Is Not A Victim.....13

V. CONCLUSION14

TABLE OF AUTHORITIES

Page

Table of Cases

Federal Cases

United States v. Washington, 384 F. Supp. 312, 359-81
(W.D. Wash. 1974) (“Boldt” decision), aff’d, 520 F.2d
676 (9th Cir. 1975), Cert. denied, 423 U.S. 1086 (1976)14

Washington Cases

Marriage of Muhammad, ___ Wn.2d ___ (3/24/05)
(Slip Op. 75061-1)7

State v. Awawdeh, 72 Wn. App. 373, 379, 864 P.2d 965, 969,
review denied, 124 Wn.2d 1004, 877 P.2d 1288, cert. denied,
513 U.S. 970, 115 S.Ct. 441, 130 L.Ed.2d 352 (1994).....5, 7, 12

State v. Bush, 34 Wn. App. 121, , 659 P.2d 1127,
review denied, 99 Wn.2d 1017 (1983).....5, 7, 12

State v. Coe, 86 Wn. App. 841, 939 P.2d 715 (1997).....12

State v. Dennis, 101 Wn.App. 223, 228-30,
6 P.3d 1173, 1176 (2000).....6

State v. Eilts, 94 Wn.2d 489, 617 P.2d 993 (1980).....7

State v. Enstone, 137 Wn.2d 675, 974 P.2d 828 (1999).....11

State v. Harrington, 56 Wn. App. 176, 181,782 P.2d 1101 (1989) ..7

State v. Kisor, 82 Wn. App.175, 916 P.2d 978 (1996)12

State v. Miszak, 69 Wn. App. 426, 848 P.2d 1329 (1993)7

State v. Johnson, 69 Wn. App. 189, 87 P.2d 950 (1993)).....6

State v. Kisor, 68 Wn. App. 610, 844 P.2d 1038 (1993)6

State v. Lee, 132 Wn.2d 498, 505, 939 P.2d 1223 (1997).....7

State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984)7

State v. Raleigh, 50 Wn. App. 248, 748 P.2d 267 (1988).....7

State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992)5

Other Jurisdictions

State v. Goding, 128 N.H. 267, 271, 513 A.2d 325 (1986)16

State v. Henderson, 36 Ill.App.3d 355, 344 N.E.2d 239 (1976).....16

Statutes

RCW 9A.75.0851, 3

RCW 9.94A.753(5).....7

RCW 9.94A.142(1)3, 12

RCW 9.94A.753(3).....3, 12

A. ASSIGNMENTS OF ERROR

1. The Court erred in awarding restitution based on legally insufficient Declarations which failed to meet the mandatory requirements of RCW 9A.75.085.
2. The Court erred in ordering restitution in the amounts requested by the State because such amounts were not ascertained with reasonable certainty.
3. The Court erred in awarding the State its investigative and administrative costs because such costs were not sufficiently related to the crimes to which Mr. Tobin plead guilty.
4. The Court erred in awarding the State restitution for sovereign Indian tribes shellfish harvest losses for which the State is not a victim.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Court erred in awarding restitution based on legally insufficient Declarations which failed to meet the mandatory requirements of RCW 9A.75.085?
2. Whether The Court erred in ordering restitution in the amounts requested by the State because such amounts were not ascertained with reasonable certainty ?
3. Whether The Court erred in awarding the State its investigative and administrative costs because such costs were not sufficiently related to the crimes to which Mr. Tobin plead guilty?
4. Whether the Court erred in awarding the State restitution for sovereign Indian tribes shellfish harvest losses for which the State is not a victim?

B. STATEMENT OF THE CASE

Douglas John Tobin plead guilty on April 25, 2003 in Pierce County Superior Court Cause No. 02-1-01236-3 to 35 fish and wildlife

felonies and 2 gross misdemeanor concerning the unlawful taking of crab during specified days during the time period of June 2000 through September 2000 and March 2001 through April 2001, and the time period of November 11, 2001, February 5, 2002, January 1 to March 15, 2002 in Pierce County Superior Court Cause No. 02-1-05810-0 to 1 count of theft in the first degree for illegal geoduck harvesting during the time period of January 2000 to March 2002. CP 24, 26-30, 158-174, 175,176-191. No appeal was taken from the sentences imposed on December 15, 2004. CP 195-208, 209-214, 36-38, 42-52. A combined restitution hearing was held on April 9, 2005. The court considered declarations filed by the State for Kevin Harrington (CP 53-69, 116-118), Wayne Palsson (CP 79-82), Bob Sizemore (CP 83-90), Edward Volz (CP 119-127), William Omaitis (CP 91-115) and The State's memorandum. CP 70-74. The Court also considered defense memorandums and declarations for Jeff Albulet. CP 215-224, 228-229,230-232. Also filed with the court was a memorandum from the Squaxin tribe, one of the victims in this case. CP 245-254. The Court heard argument from the parties, however, no testimony was taken and the court determined the amount of the award based solely on the documents filed and the arguments of counsel, after which the court ordered restitution in the amount of \$ 879, 408.40 for the poached geoduck

and in the amount of \$247,803.00 for the poached crab. CP 77-78, 243-244. The Court adopted Omait's calculations and found the loss to the State was \$764,408 representing the bid price for geoduck and \$198,000 for crab representing a wholesale value of \$3.00 per pound. RP 28-29. The court also included an award for special damages for the State's investigative and clerical costs. RP 37.

Appeals were timely filed on both matters on April 13, 2004 and have been consolidated by this court on review under Court of Appeals No. 31636-6-II. CP 128-130, 255-260.

C. ARGUMENT

Issue No 1: The Court Erred In Ordering Restitution In The Amounts Requested By The State Because Such Amounts Were Not Proven By Competent Evidence Because The Declarations Submitted In Support Of The Claimed Losses Failed To Meet The Statutory Requirements Of RCW 9A.75.085.

In addition to the substantive deficiencies in the declarations submitted (See arguments 2 and 3 below), the declarations fail to meet the basic statutory requirements for consideration by the court.

Concededly, restitution may be made by affidavit. The use of declarations in lieu of affidavits is authorized by statute:

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established,

or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
 - (2) Is subscribed by the person;
 - (3) **States the date and place of its execution;** and
 - (4) States that it is so certified or declared under the laws of the state of Washington.
- ...

RCW 9A.75.085, in part.

Additionally, General Rule 13 provides in part as follows:

- (a) **Unsworn Statement Permitted.** Except as provided in section (b), whenever a matter is required or permitted to be supported or proved by affidavit, the matter may be supported or proved by an unsworn written statement, declaration, verification, or certificate executed in accordance with RCW 9A.75.085.

Even though the State was permitted to submit declarations in lieu of live testimony or sworn affidavits, the State tendered declarations that failed to meet the minimum the statutory requirements. None of the proffered declarations contain the date and *place* of execution, as such they are legally insufficient as a basis for an award of restitution. See CP

91-115 (Omaitis Declaration), 53-69, 116-118 (Harrington Declarations), 119-127 (Volz Declaration), 83-90 (Sizemore Declaration), 79-82 (Palsson Declaration).

Issue No 2: The Court Erred In Ordering Restitution In The Amounts Requested By The State Because Such Amounts Were Not Ascertained With Reasonable Certainty.

The authority to order restitution is purely statutory. State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). The amount of restitution an offender must pay must be 'based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury.' Former RCW 9.94A.142(1) (2000) (recodified in 2001 as RCW 9.94A.753(3)). 'Easily ascertainable' damages are those tangible damages proven by sufficient evidence to exist. State v. Bush, 34 Wn. App. 121, 123, 659 P.2d 1127, review denied, 99 Wn.2d 1017 (1983). Evidence is sufficient if it provides a reasonable basis for estimating the loss and does not subject the trier of fact to speculation or conjecture. State v. Awawdeh, 72 Wn. App. 373, 379, 864 P.2d 965, 969, review denied, 124 Wn.2d 1004, 877 P.2d 1288, cert. denied, 513 U.S. 970, 115 S.Ct. 441, 130 L.Ed.2d 352 (1994); Bush, 34 Wn. App. at 123. Where the amount of restitution is not agreed to, the State must establish the amount by a

preponderance of the evidence. The award must be based on a causal relationship between the offense and the victim's losses or damages. State v. Johnson, 69 Wn. App. 189, 191, 87 P.2d 950 (1993).

Although the Rules of Evidence do not apply at restitution hearings, (ER 1101(c)) the evidence supporting restitution must be reasonably reliable, and the defendant must be given an opportunity to refute it. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). If a restitution order is set aside on appeal because of an insufficient factual basis, additional evidence cannot be introduced on remand, because that would result in restitution set outside the 180-day period. State v. Dennis, 101 Wn.App. 223, 228-30, 6 P.3d 1173, 1176 (2000).

If a defendant pleads guilty to a lesser offense or fewer offenses, the defendant may agree to pay restitution for offenses that were not prosecuted pursuant to the plea agreement. RCW 9.94A.753(5); see State v. Lee, 132 Wn.2d 498, 505, 939 P.2d 1223 (1997). Absent such an agreement, restitution can only be imposed for damages resulting from the specific crime of which the defendant was convicted. For example, if the defendant defrauds a number of different people, restitution can only be awarded to the victims named in the information. State v. Eilts, 94 Wn.2d 489, 617 P.2d 993 (1980). When a series of thefts is committed against

the same victim, restitution can only be imposed for the specific theft that the defendant was convicted of. State v. Miszak, 69 Wn. App. 426, 848 P.2d 1329 (1993); State v. Raleigh, 50 Wn. App. 248, 748 P.2d 267 (1988).

Here, Tobin timely disputed the accuracy of the claimed of damages and the State's standing to assert damages on behalf of sovereign Indian tribes. Cf State v. Harrington, 56 Wn. App. 176, 181,782 P.2d 1101 (1989) (argument that amount of restitution exceeded fair market value of car waived when raised for first time on appeal).

The court's reliance on the estimate of damages provided by Mr. Omaitis for the State was not sufficiently accurate to establish the loss to the State. Omaitis was asked to provide an estimate of crab and geoduck taken during the time period between January 2000 and March 18, 2002 by Doug Tobin and Toulok. Sources relied upon were air freight bills invoices, other sales records and witness statements. Dec. p. 2. A full twenty five percent of the total pounds of claimed State losses for stolen geoduck was "estimated". Dec. pg. 3¹. With respect to claimed crab losses, Omaitis estimated a full twenty-one per cent of the state's claimed

¹ "The number of estimated sales invoices used to determine the total pounds and dollar value of stolen Geoduck is 25% of the total." Omaitis Dec. p. 3. CP 93.

losses.² Dec. p. 3-4. Once the fact of damage is established, the amount need not be shown with mathematical certainty, State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984), however it must not be based on mere conjecture or speculation. State v. Awawdeh, 72 Wn. App. at 379; Bush, 34 Wn. App. at 123. As this Court recently held, 21% is not de minimus and ordered remand in a marital property distribution. In re the Marriage of Muhammad, ___ Wn.2d ___ (3/24/05) (Slip Op. 75061-1) (classified of 21% of pension accrued meretricious relationship as minimal is “inexplicable”). Likewise, estimates of 21 to 25% are too significant to support an award and as such render the award speculative and conjectural.

Additionally, Omaitis did not distinguish between lawfully harvested and stolen shellfish that was shipped via air freight; he simply concluded that all air freight shipments of shellfish for which he could not find other sales documentation was stolen. Omaitis Dec. p. 2-3. CP 91-94. As described in the declaration of Jeff Albulet (CP 30-232) Clearbay had Toulok ship via air freight legally harvested shellfish brought to Toulok by other harvesters. Thus losses calculated via air freight bills were not reasonably accurate to establish “easily ascertainable” damages either.

² “The total number of estimated calculations used to determine the total pounds and

Similarly, the assumption that Clearbay would not ship product to Tobin is not supported by the record. CP 230-232. As stated in the Albulet Declaration – “On occasion, for various reasons, Clearbay Fisheries would send geoducks product to Seattle over the Canadian border to the Toulock [Tobin] plant for shipment to customers in various parts of the United States.” Thus, the Harrington Declaration Ex. 6 p. 3.³ (CP 53-69) in which he surmises there would be no reason for Clearbay to ship from Toulock is without out factual basis and calculations based on this assumption are not appropriate.

As pointed out by Tobin, Mr. Omait's calculations were also based on information obtained from Jack Li. Li was a middleman – he purchased seafood product and then resold it to others. Mr. Li, while facing his own criminal charges, fled, however, not before he allegedly told State investigators he purchased all his geoduck from Tobin's seafood processing plant. Harrington Dec p.3. CP116-118. Consequently, Mr. Omait's estimated the amount of geoduck allegedly poached by Tobin based on the bank deposits made to Li by his purchasers. The problem with this accounting method is it does not take into account the fact that as

dollar amount of poached Crab is 21%.” Omait's Dec. p. 4. CP 94.

³ “In all my experience investigating the geoducks industry, including extensive work examining airline records, I am not aware of a single instance of a Canadian company transporting geoducks harvested in Canada to Sea/Tac airport.”

a middle man he included a markup in his sales price. By calculating the geoduck poundage from these deposits Omait's approach overestimates the amount of geoduck because it calculates the poundage based on deposits that include a markup. Therefore, even if all the geoducks purchased by Li were obtained from Tobin the numbers relied on by Omait's to establish the amount is inaccurate because it includes Li's markup. Moreover, it includes legally purchased product and product sold from Tobin's processing plant that came from other divers using Tobin's boat, the Typhoon, as a dive platform. At least 19 Indian divers used the Typhoon and the defendant indicated in his materials that he believed Li was buying from other divers as well as from Tobin. Squaxin Tribe Memo. P. 9-10. CP 245-254.

Tobin also challenged the information in the Harrington declaration indicating he was told by a Mr. Chau that Chau was told by Li that he purchased his geoduck from Tobin. Mr. Chau has never met Tobin and lacks reliable knowledge of where Li's geoducks came from. Significantly, Li's statements should not be taken at face value because of his personal motive to shift blame and curry favor with the government in the hopes of avoiding or lessening his own potential punishment for his own crimes. Consequently, even though the rules of evidence do not apply

at restitution hearings, the evidence must be sufficiently reliable for the court to calculate the loss to the victim. Because the State relied on unsupported and unreliable evidence it failed to muster sufficient evidence supporting its claimed losses.

Issue No 3: The Court Erred In Awarding The State Its Investigative And Administrative Costs Because Such Costs Were Not Sufficiently Related To The Crimes To Which Mr. Tobin Plead Guilty.

The State tendered the Declaration of Edward Volz in support of claimed investigative costs. This Declaration is insufficient as a matter of law. The requirements for a valid declaration are few but are necessary. As described above, the Declaration must contain both the date and place of execution. Here the place of execution is lacking. Thus the court should not consider this declaration in support of the request for investigative and administrative costs.

Moreover, the claimed costs are not proper because they are not substantiated with reasonable accuracy and because they are not sufficiently tied to the crimes to which Tobin plead guilty. Restitution is appropriate whenever there is a causal connection between the defendant's crimes and the injuries. State v. Enstone, 137 Wn.2d 675, 974 P.2d 828 (1999). As discussed above, the amount of restitution an offender must

pay must be 'based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury.' Former RCW 9.94A.142(1) (2000) (recodified in 2001 as RCW 9.94A.753(3)). 'Easily ascertainable' damages are those tangible damages proven by sufficient evidence to exist. State v. Bush, 34 Wn. App. at, 123. Evidence is sufficient if it provides a reasonable basis for estimating the loss and does not subject the trier of fact to speculation or conjecture. State v. Awawdeh, 72 Wn. App. at 379; Bush, 34 Wn. App. at 123. There is no requirement that the damages be foreseeable. Id. The trial court does have discretion to refuse to order restitution when the injuries are only remotely related to the crime. State v. Enstrone; State v. Coe, 86 Wn. App. 841, 843, 939 P.2d 715 (1997); State v. Kisor, 82 Wn. App. at 180.

It was error for the court to include investigative, staff support costs, and survey costs as special damages for the restitution for the geoduck offense because the State did not prove the costs and because the costs were not sufficiently related to Mr. Tobin's actions.

As described by Mr. Volz at page 8 of his Declaration (CP 119-127) he guesstimated that two Fish and Wildlife detectives spent **about** 75% of their time on the Tobin case, that another one spent **about** 60% of

his time for 12 months on the case, and that yet another detective spent **about** 40% of his time for 18 months on the Tobin case and that two other detectives spent **about** 20% of their time in Tobin for 12 months. No where does Mr. Volz attach any supporting documentation, such as time sheets, pay stubs or similar corroborating information. The costs included investigation in areas for which there is no evidence Mr. Tobin conducted illegal activities. Because the costs are not sufficiently supported and fail to establish the necessary nexus to the Tobin crimes, the award for special damages must be reversed.

Issue № 4: The Court Erred In Awarding The State Restitution For Sovereign Indian Tribes Shellfish Harvest Losses For Which The State Is Not A Victim.

The State is not a “victim” for tribal fisheries losses. As made clear by the Squaxin Island Tribe memorandum (CP 245-54), the State has no right to any geoducks taken within Squaxin fishing territory, thus it was error to include such geoducks in the restitution ordered to the State. The Squaxin Island Tribe, the Nisqually and the Puyallup Tribes are all federally recognized tribes with treaty rights to shellfish, including geoducks and crab. In western Washington, treaty tribes’ usual and accustomed grounds and stations have been specifically determined in the Boldt decision and subsequent litigation. United States v. Washington,

384 F. Supp. 312, 359-81 (W.D. Wash. 1974)(“Boldt” decision), aff’d, 520 F.2d 676 (9th Cir. 1975), Cert. denied, 423 U.S. 1086 (1976). Because the State has no interest or claim to the treaty tribes shellfish harvest rights, it was error to award the State restitution for federally recognized and adjudicated sovereign Indian tribal shellfish harvest losses.

D. CONCLUSION

The State failed to tender legally sufficient declarations in support of its claimed losses and they must be disregarded. Moreover, the State’s conceded it had to estimate 21% of the claimed crab losses and 25% of the claimed geoduck losses. Such an estimate is unacceptably speculative requiring the order of restitution be reversed. The Court also erred in awarding investigative and office costs because such costs were not proven to be sufficiently related to Mr. Tobin’s actions. Finally, the Court erred in ordering an award to the State for tribal shellfish harvest losses because the tribes are sovereigns for which the State has no authority recover losses. Based on the above, Tobin respectfully requests

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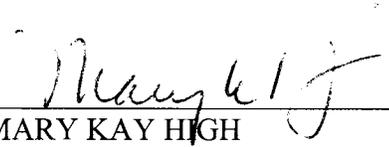
this court to reverse the Court's restitution orders.

DATED this ¹⁵~~14~~th day of March 2005.

Respectfully submitted,

THE LAW OFFICE OF MARY KAY HIGH

By



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BY _____
DEPUTY

CERTIFICATE OF SERVICE

Mary Kay High hereby certifies under penalty of perjury under the laws of the State of Washington that on the 15th day of April 2005, I delivered a true and correct copy of the Appellant's Opening Brief to which this certificate is attached by United States Mail, to the following:

Mr. Douglas Tobin, DOC # 253648
Pierce County Jail
910 Tacoma Avenue South
Tacoma, WA 98402

And, I delivered via ABC/LMI a true and correct copy of the Appellant's Opening Brief and verbatim report of proceedings to which this certificate is attached, to:

Ms. Kathleen Proctor
Pierce County Dep. Pros. Atty.
930 Tacoma Avenue South, Rm. 946
Tacoma, WA 98402

Signed at Tacoma, Washington this 15th day of April 2005.



Mary Kay High