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JUN 19 2013

King County Prosecutor  
Appellate Unit

NO. 69454-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN SAWYER,

Appellant.

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

The Honorable Lori K. Smith, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS  
STATE OF WASHINGTON

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	5
<u>THE TRIAL COURT ERRED BY ORDERING SAWYER TO     PAY \$31,872.45 IN RESTITUTION.</u> .....	5
D. <u>CONCLUSION</u> .....	11

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State ex rel. Carroll v. Junker</u> 79 Wn.2d 12, 482 P.2d 775 (1971).....	6
<u>State v. Acevedo</u> 159 Wn. App. 221, 248 P.3d 526 (2010).....	7, 8
<u>State v. Davison</u> 116 Wn.2d 917, 809 P.2d 1374 (1991).....	7
<u>State v. Dedonado</u> 99 Wn. App. 251, 991 P.2d 1216 (2000).....	5, 7
<u>State v. Griffith</u> 164 Wn.2d 960, 195 P.3d 506 (2008).....	6, 10
<u>State v. Hunsicker</u> 129 Wn.2d 554, 919 P.2d 79 (1996).....	6
<u>State v. Kinneman</u> 155 Wn.2d 272, 119 P.3d 350 (2005).....	6
<u>State v. Kisor</u> 68 Wn. App. 610, 844 P.2d 1038 (1993).....	5
<u>State v. Mark</u> 36 Wn. App. 428, 675 P.2d 1250 (1984).....	6
<u>State v. Tobin</u> 161 Wn.2d 517, 166 P.3d 1167 (2007).....	6, 7

**TABLE OF AUTHORITIES**

	Page
<b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
RCW 9.94A.753 .....	5
U.S. Const. amend. XIV .....	5
Wash. Const. art. I, § 3.....	5

A. ASSIGNMENT OF ERROR

The trial court erred by ordering \$31,872.45 in restitution.

Issue Pertaining to Assignment of Error

Did the trial court err by imposing restitution in an amount that significantly exceeds the amount of the loss proved to be causally connected to appellant's offense?

B. STATEMENT OF THE CASE

The State charged appellant Brian Sawyer with first degree trafficking in stolen property. CP 7-8. The State alleged that between March 2010 and May 2011, Sawyer obtained over \$20,000 worth of stolen copper ingots from Rainier Ballistics, a bullet manufacturer in Fife, Washington, and sold them as scrap metal to Commercial Metal, a metal recycler in Pacific, Washington. CP 3-5.

According to Brenna Otto, the manager of Commercial Metal, Sawyer was a "regular customer" starting in July 2009. 4RP<sup>1</sup> 14-15, 22, 26. In about November 2010, Otto noticed Sawyer was bringing in large quantities (200 to 400 pounds at a time) of high-grade copper ingots in grey five-gallon buckets. 4RP 45, 47; Exs. 2 & 4. Sawyer brought in

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<sup>1</sup> This brief refers to the verbatim reports as follows: 1RP - 7/11/12; 2RP - 7/12/12; 3RP - 7/16/12; 4RP - 7/17/12; 5RP - 7/18/12; 6RP - 7/19/12; 7RP - 7/20/12; 8RP - 8/24/12; and 9RP - 11/19/12.

other metals as well, including non-ingot high-grade copper, but mostly the ingots. 4RP 70, 72-73.

In mid-2011, Otto contacted Detective David Newton of the Pacific Police Department about Sawyer. 4RP 51-53; 7RP 26. Otto agreed to contact Newton the next time Sawyer brought in ingots. 4RP 54. Otto also prepared a list of the dates and amounts of the high-grade copper Sawyer sold to Commercial Metals between March 4, 2010 and May 17, 2011. 4RP 56, 66-67; Ex. 6. The list documents 36 transactions involving "Copper#1," from "1 lb" to "442 lb" per transaction, and totaling 7,395 pounds and \$25,677.95 in payments to Sawyer. 4RP 68; Ex. 6.

Michael Holman, a scale operator at Commercial Metals between 2009 and 2012, recalled Sawyer was a "frequent customer." 4RP 74, 80. In 2010 Sawyer started bringing unusually large quantities of copper in five-gallon buckets, mostly in ingot form. 4RP 82-84, 88. According to Holman, Sawyer brought in other forms of copper in lesser quantities, but once the ingots started to appear, that was all he could recall Sawyer bringing in. 4RP 84, 88. Holman could not recall exactly when Sawyer first brought in the ingots, but he mentioned it to Otto about a month after he first noticed. 4RP 85-86, 89.

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Based on Otto's report, Detective Newton began investigating Sawyer. 6RP 31, 36. On May 17, 2011, Newton confronted Sawyer about the origin of the ingots. 6RP 36-37. Sawyer said he got them from a man in West Seattle for whom he had no name or contact information. 6RP 37-38.

Newton's investigation eventually led him to Rainier Ballistics, a bullet manufacturer in Fife. 5RP 93; 6RP 40. Rainier Ballistics manager John O'Connell showed Newton the copper ingots they purchased for use in the bullet manufacturing process and the five-gallon buckets they were delivered in. 5RP 102-03; 6RP 40-41. According to Newton, both the ingots and the buckets were consistent with those Sawyer was selling to Commercial Metal. 6RP 41. Newton encouraged O'Connell to check his copper inventory. 6RP 41.

O'Connell testified Rainier Ballistics uses 50,000 to 60,000 pounds of high-grade copper a year. 5RP 100. The copper is delivered in five-gallon buckets, each weighing about 220 pounds, and cost between \$3 and \$5 per pound. 5RP 102-03.

On July 6, 2011, Rainier Ballistics conducted the inventory check suggested by Newton and discovered it had 7,580 pounds of copper less than on June 1, 2011, which was more than it would normally use in a

month. 6RP 18-20. The manager who performed the inventory, Rickie Lengston, noted that approximately eight buckets of one particular type of copper were missing. He could not say when it disappeared, only that it was missing as of July 6, 2011. 6RP 23-24. Neither Lengston nor any other Rainier Ballistic employee offered any opinion as to when any of the copper may have been taken. Lengston did say, however, that later inventory checks revealed no additional unexplained losses. 6RP 25.

At trial, the State attempted to link Sawyer to David Gorton, a graveyard shift employee of Rainier Ballistics during the period Sawyer was selling the ingots to Commercial Metal, and who quit shortly after the inventory shortage was discovered. 5RP 27, 39-40, 98-99, 130; 6RP 24. In closing argument, the State theorized Gorton stole the copper from his employer and gave it to Sawyer. 6RP 90-98.

The jury convicted Sawyer as charged. CP 14, 17. The trial court imposed a standard range sentence of 12 months. CP 48-54; 8RP 13. The court later ordered Sawyer to pay \$31,872.45 in restitution. Supp CP \_\_ (sub no. 74, Order Setting Restitution, 11/19/12). The court set the restitution amount by multiplying the total pounds of copper Sawyer sold to Commercial Metal between March 4, 2010, and May 17, 2011 (7,395

pounds) by the average per pound cost for copper paid by Rainier Ballistics (\$4.31/pound). 9RP 3. Sawyer appeals. CP 56-66.

C. ARGUMENT

THE TRIAL COURT ERRED BY ORDERING SAWYER TO PAY \$31,872.45 IN RESTITUTION.

In seeking restitution, the State bore the burden of presenting substantial credible evidence establishing a causal connection between Rainier Ballistics' claimed loss, Sawyer's misconduct, and the amount of restitution ordered. The State failed to meet its burden. This Court should therefore vacate the restitution order.

A person may not be deprived of property without due process of law. U.S. Const. amend. XIV; Const. art. I, § 3. Defendants have a due process right to have restitution determined based on reliable evidence. State v. Kisor, 68 Wn. App. 610, 619-20, 844 P.2d 1038 (1993). In determining restitution, the court can rely on no facts beyond those admitted in the plea agreement or proved at the time of the restitution hearing. State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000).

"Restitution is an integral part of sentencing, and it is the State's obligation to establish the amount of restitution." Id. at 257. A restitution order must be based on "easily ascertainable damages." RCW

9.94A.753(3).<sup>2</sup> While the claimed loss need not be established with specific accuracy, it must be supported by substantial credible evidence. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). This Court should reverse an inadequately supported restitution order. State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250, 1253 (1984).

If the defendant disputes facts relevant to determining restitution, the State must prove the damages by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005); State v. Hunsicker, 129 Wn.2d 554, 559, 919 P.2d 79 (1996). This Court reviews a restitution order for an abuse of discretion, which occurs upon application of an incorrect legal analysis, or when the decision is based on untenable grounds or untenable reasons. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

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<sup>2</sup> RCW 9.94A.753(3) provides:

Restitution ordered by a court pursuant to a criminal conviction shall 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. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The 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.

Restitution is proper only when a causal connection exists between the crime and the injuries for which compensation is sought. Dedonado, 99 Wn. App. at 256. Restitution is limited to victims who have been injured “as a direct result of the crime charged.” State v. Davison, 116 Wn.2d 917, 809 P.2d 1374 (1991). Causation is evaluated using a “but-for” test. Tobin, 162 Wn.2d at 524. Restitution is permitted only if, but for the crime, the victim would not have suffered the loss described. Id. at 524-25.

The mere fact of a loss is insufficient to establish the necessary causal connection. State v. Acevedo, 159 Wn. App. 221, 229-31, 248 P.3d 526 (2010). Acevedo is instructive. Acevedo, who was convicted of possessing a stolen car, challenged the resulting restitution order, which required him to pay the full value of the car, \$6,000. Id. at 224, 226. The police discovered Acevedo in possession of the car six months after it was stolen. He told police he purchased the car in the "completely stripped" condition police found it in. Id. at 230. There was no evidence to show Acevedo stole the car or possessed it when it was stripped. Accordingly, no evidence showed that “but for” Acevedo's possession of the car it would not have been damaged. Id. at 230-31. As such, this Court concluded the State had failed to show a causal connection between

Acevedo's possession and the damage caused by the stripping of the car. This Court therefore reversed the restitution order. Id. at 231.

Sawyer contested the amount of restitution sought by the State. 9RP 3. Sawyer's counsel arguing that the most the State could prove missing from Rainier Ballistics' copper supplies were the eight buckets of the one particular type of copper mentioned by Lengston, that is 1760 pounds worth \$7,585.60. Id. Counsel also noted the evidence showed not all of the copper Sawyer sold Commercial Metals during the charging period was in ingot form. 9RP 4. As such, the State had to prove by a preponderance of the evidence the facts necessary to support ordering more than conceded by Sawyer. Kinneman, 155 Wn.2d at 285.

Similar to Acevedo, the evidence in Sawyer's case is insufficient to establish a causal link between the reduction of Rainier Ballistics' copper inventory between June 1, 2011 and July 6, 2011, Sawyer's copper sales to Commercial Metals between March 2010 and May 2011, and the amount of restitution ordered. Primarily, the State failed to establish how much copper Rainier Ballistics actually lost. To the extent that it did, that amount is significantly less than what Sawyer was ordered to pay restitution for.

Rainier Ballistics determined in July 2011 that high-grade copper was missing from its inventory, but there was never a determination made of exactly how much. At best, the State proved, according to Rainier Ballistics' records, there were 7,580 fewer pounds of copper on hand on July 6, 2011 than on June 1, 2011. 6RP 18-20. According to Rainier Ballistics manager John Connell, however, the company used approximately 50,000 to 60,000 pounds of copper a year, which works out to between 4,166 pounds and 5,000 pounds a month. 5RP 100. Thus, of the 7,580-pound difference in inventory between June 1, 2011 and July 6, 2011, 4,166 pounds to 5,000 pounds went into the production of bullets, leaving between 2,580 pounds and 3,414 pounds actually missing. This is less than half the 7,395 pounds for which Sawyer was ordered to pay restitution.

Not only did the State fail to establish the amount of copper missing from Rainier Ballistics, it also failed to establish how much of the copper Sawyer sold to Commercial Metals came from Rainier Ballistics. As noted, Sawyer's attorney highlighted manager Otto's statement that copper ingots were not the only form of high-grade copper Sawyer sold to Commercial Metals. 9RP 4. Even the State acknowledged, at least implicitly, that not all of the copper Sawyer sold to Commercial Metal

could be linked to the ingots missing from Rainier Ballistics. Rather, the prosecutor suggested that those sale quantities in multiples of 220 pounds (the approximate weight of each bucket of copper ingots) should be considered a sale of stolen ingots. 9RP 5. Yet the trial court ordered Sawyer to pay restitution based on all the high-grade copper he sold to Commercial Metals during the charging period, that is, 7,395 pounds. 9RP 2, 4, 6-7; Ex. 6. Given that Rainier Ballistics was missing at most 3,414 pounds of copper, this was an abuse of discretion. There is no tenable basis to order Sawyer to pay restitution in an amount more than twice the value of the copper shown to be missing.

The State failed to present “substantial credible evidence” in support of the restitution amount ordered. Griffith, 164 Wn.2d at 965. This Court should therefore vacate the restitution order. Mark, 36 Wn. App. at 434.

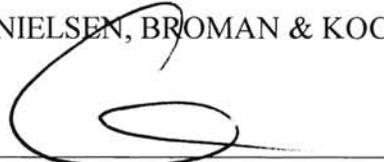
D. CONCLUSION

This Court should vacate the restitution order.

DATED this 17th day of June 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "C. Gibson", is written over a horizontal line.

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BRIAN SAWYER,

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COA NO. 69454-5-1

**DECLARATION OF SERVICE**

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

THAT ON THE 19<sup>TH</sup> DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BRIAN SAWYER  
KING COUNTY JUVENILE DETENTION CENTER  
620 WEST JAMES  
KENT, WA 98032

**SIGNED** IN SEATTLE WASHINGTON, THIS 19<sup>TH</sup> DAY OF JUNE, 2013.

X Patrick Mayovsky

2013 JUN 19 PM 4:12  
COURT OF APPEALS  
STATE OF WASHINGTON