69932-6

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NO. 69932-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GREGORY WATERS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **The prosecution mistakenly asserts it was entitled to a lesser included offense instruction if the jury disbelieved its evidence.**

As the prosecution concedes, the legal threshold for the court to grant the State's request to instruct the jury to consider a lesser included offense is that the evidence affirmatively establishes only the lesser offense was committed. *State v. Fernandez-Medina,* 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). This legal test requires that "the evidence must affirmatively establish the [proponent]'s theory of the case - it is not enough that the jury might disbelieve the evidence pointing to guilt." *Id.*

Put another way, the court "may not" give an inferior degree instruction when the factual basis for the instruction is that the jury disbelieves the evidence presented. *State v. Wright*, 152 Wn.App. 64, 71-72, 214 P.3d 968 (2009). While a jury may weigh evidence when deciding the sufficiency of the evidence, the jury's right to discount evidence does not play a role in whether the State is entitled to an inferior offense instruction.

In *Wright*, the Court of Appeals held it was improper to give a third degree rape instruction to the jury when the complainant testified

she was forcibly raped, which would prove the charged offense of second degree rape if believed, while the defendants said the encounter was consensual, which would not be a crime. To instruct the jury on third degree rape as an inferior degree offense, there needed to be evidence of nonconsensual sex. *Id.* at 72. The prosecution argued that jurors could have decided that although force was used, it was not significant enough to rise to the level of forcible compulsion. *Id.* at 73.

The *Wright* Court noted that the complainant testified she was held down, pushed, and pulled, which would be sufficient to show the force required for second degree rape. *Id.* Even if jurors could have compromised based on the strength of the evidence, the court may not give an inferior degree offense instruction based on disbelieving or discounting some of the State's witnesses, and consequently, the trial court erred by instructing the jury on this lesser offense. *Id.*

Here, the prosecution claims the court was justified in instructing the jury that it could convict Mr. Waters of the lesser offense of second degree trafficking in stolen property because the jury "could (and apparently did) disbelieve the State's witnesses." Response Brief at 6. But disbelieving the State's witnesses is not a valid basis for an inferior degree offense instruction.

Zach Waters and Kerri Uitbenhowen denied giving Gregory Waters any permission for Mr. Waters to take and sell the metal. RP 43, 50-51. Mr. Waters told a police detective that Ms. Uitbenhowen gave him permission to take the metal, sell it, and share the proceeds with her. RP 122.

The prosecution posits that the jury could have disbelieved Zach and Uitbenhowen, and believed Mr. Waters. Response Brief at 6. But if the jury believed Mr. Waters's explanation that he had permission to take and sell the property, there is no affirmative evidence that the permission he received was invalid. Taking Mr. Waters's statement as true, he asked for permission from his son's girlfriend to sell the metal and he received permission. RP 122. He used his own name and offered his own identification when selling the scrap metal, without any effort to conceal his identity or involvement. RP 101, 112. Even under the lesser recklessness *mens rea* for second degree trafficking in stolen property, there must be evidence showing he disregarded "a substantial risk" that he was selling stolen property and this disregard is a "gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010 (1)(c); RCW 9A.82.055.

No evidence affirmatively demonstrated Mr. Waters was not guilty of first degree trafficking in stolen property but guilty of second degree trafficking. If he believed he had permission to take and sell the old metal gates seemingly abandoned in an old garage, he did not recklessly disregard the substantial risk that he lacked permission.

The jury was required to disbelieve and discount evidence presented by the prosecution in order to convict Mr. Waters of second degree trafficking in stolen property. The prosecution is not entitled to a lesser instruction solely on the basis that the jury might disbelieve some of the evidence. *Fernandez-Medina,* 141 Wn.2d at 456. A court lacks authority to offer an inferior degree offense when the jury's verdict would be based on disbelieving and discounting the evidence presented. *Fernandez-Medina,* 141 Wn.2d at 456; *Wright*, 152 Wn.App. at 73-74.

The State needed to make a particularized showing that only the lesser was committed and it failed to do so. There was no affirmative evidence allowing the jury to infer that Mr. Waters committed only the lesser offense of second degree trafficking in stolen property.

2. **Restitution is punishment that requires a jury finding when based on disputed facts.**

a. *The restitution imposed was insufficiently proved.*

The prosecution did not prove that the old metal gates left in a heap in a doorless garage on property rented to others should be valued for restitution purposes at the price for which they were purchased many years earlier. The gates had not been used for many years. The owners did not intend to reopen the dairy farm or use them as dairy gates. Their original purchase price did not represent their value at the time they were taken. The only value proven was what the gates were worth as scrap metal.

The courts posited that the owners of the dairy should receive compensation based the theoretical possibility they could decide to sell their property to a dairy farmer along with the gates suffices as a valid basis of assessing restitution. RP 173. But this speculation does not suffice. The Holtcamps did not imply any intent to sell the farm to another dairy owner or resume dairy operations in a long-shuttered dairy. *See* RP 70-71, 80. There was no market for selling dairy guards, particularly ones that were shaped only for use in the Holtcamps's barn. RP 77, 116. Brian Parberry not only operated a scrap metal facility but

also resold items that retained value, rather than just using them for the value of the metal. RP 116. He testified that the gates had no value of which he was aware other than their metal. RP 108, 116. This testimony was the only rational basis on which to predicate restitution.

b. *Restitution is punishment that may not be imposed based on judicial speculation.*

There was no jury finding as to the amount of guards taken or their value. Although the decision in *State v. Kinneman*, 155 Wn.2d 272, 280, 119 P.3d 350 (2005), states that restitution is not a factual question that the jury must decide, its legal underpinnings have been undermined by recent cases.

The United States Supreme Court held that criminal fines are subject to the rule of *Apprendi* because they are punishment.[1] *Southern Union Co. v. United States*, __ U.S. __, 132 S. Ct. 2344, 2354, 183 L. Ed. 2d 318 (2012). In *Southern Union*, the defendant was a corporation criminally punished, and its punishment included a $50,000 fine for each day it violated the Resource Conservation and Recovery Act. 132 S. Ct. at 2349. The defendant argued that imposition of anything more

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[1] *Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

than $50,000, one day's fine, required a jury finding of the duration of the violation. *Id.* The Supreme Court agreed. *Id.* at 2357.

The Court rejected any distinction between punishment based on incarceration or on monetary fines. *Id.* at 2352-53. The "core concern" of *Apprendi* is reserving for the jury "the determination of facts that warrant punishment." *Id.* at 2350. "That concern applies whether the sentence is a criminal fine, or imprisonment or death." *Southern Union*, 132 S. Ct. at 2350. *Apprendi* applies where the punishment is based upon "the amount of the defendant's gain or the victim's loss." *Southern Union*, 132 S. Ct. at 2350-51. This same gain or loss is precisely how restitution is determined under RCW 9.94A.753. "Restitution is part of an offender's sentence." *State v. Cosgaya-Alvarez*, 172 Wn. App. 785, 790, 291 P.3d 939 (2013), *rev. denied*, 177 Wn.2d 1017 (2013) (internal citation omitted).

Southern Union demonstrates that restitution is part of the punishment imposed for a criminal conviction and subject to the same requirements of proof as other factual questions that increase punishment. *Kinneman*, 155 Wn.2d at 280,

Additionally, *Kinneman* relied on the now-overruled notion that the Sixth Amendment concerns of *Apprendi* and *Blakely*[2] only apply when the punishment exceeds the maximum, and reasoned that since restitution has no "maximum," the Sixth Amendment is not implicated. 155 Wn.2d at 282. The United States Supreme Court undermined this aspect of *Kinneman* in *Allyene v. United States*, _ U.S. _, 133 S. Ct. 2151, 2160, 186 L. Ed.2d 314 (2013).

In *Allyene*, the Supreme Court held that when minimum terms are mandated based on factual findings, the jury must determine that particular fact. *Id.* "[A] fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense" that must be proved beyond a reasonable doubt. *Id.*

Allyene overruled *Harris v. United States,* 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), which had held that judicial factfinding does not violate the Sixth Amendment when it only increases a mandatory minimum sentence. 133 S.Ct. at 2155. In *Allyene*, the Court ruled that because mandatory minimum sentences increase the punishment for a crime, "any fact that increases the

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[2] *Blakely v. Washington*, 542 U.S. 296, 298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

mandatory minimum is an 'element' that must be submitted to the jury." *Id.* Under *Allyene*, any fact increasing punishment must requires jury fact-finding, regardless of whether the punishment exceeds the maximum.

The punishment permitted by RCW 9.94A.753 is $0 unless the prosecution proves a certain amount of "easily ascertainable damages" based on the loss to the victim. The court may not impose any amount of restitution absent a certain factual determination. RCW 9.94A.505. Because that factual determination results in an increase in punishment, it must be made by the jury. *Allyene*, 133 S. Ct. at 2160.

Kinneman likened restitution to the advisory federal sentencing guidelines because even though RCW 9.94A.753 requires restitution in most cases, a court may forego restitution in extraordinary circumstances. 155 Wn.2d at 281-82 (citing *Booker v. United States*, 543 U.S. 220, 245, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). But by making the federal sentencing guidelines advisory, they are no longer binding on the sentencing court. *Booker*, 543 U.S. at 233. The potential for a downward departure under the prior, mandatory federal scheme, did not avoid the constitutional issue. *Id.*

Nothing in the restitution statutes would permit a judge to impose an amount less than the actual damages proved in a nonextraordinary case. The exception for extraordinary circumstances in RCW 9.94A.753 is not only undefined, it is so rarely used that no published cases even explain when such extraordinary circumstances exist. Any time a victim receives benefits from the crime victims' compensation fund, the trial court has no discretion at all and must impose restitution. RCW 9.94A.753(7). The SRA's mandate of restitution is not "advisory" like the federal sentencing guidelines, it is mandatory.

Before a court may impose any amount of restitution, the Sixth and Fourteenth Amendments require the State prove damages resulting from the loss or injury to a jury beyond a reasonable doubt. *Southern Union*, 132 S. Ct. at 2350-51. Here, the court speculatively concluded that the Holtcamps should be compensated for a certain amount of cattle guards at a certain value but neither fact was found by the jury. This punishment may not be imposed both because it was not proven under the requirements of RCW 9.94A.753 and because it is premised on factual determinations made without a jury finding and absent proof beyond a reasonable doubt.

B. CONCLUSION.

For the foregoing reasons, Gregory Waters respectfully requests this court vacate his conviction and the restitution order imposed.

DATED this 3rd day of December 2014.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. GREGORY WATERS, Appellant.	)))))))))	NO. 69932-6-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF DECEMBER, 2013.

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