

69932-6

69932-6

NO. 69932-6-I

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 OPENING BRIEF

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A. INTRODUCTION.

Gregory Waters sold a load of metal to a recycling and scrap business and received \$279.30 for the value of the metal. The metal consisted of cattle guards used by a dairy farm that had ceased operation in 1990 and sat in piles in an unused barn.

Mr. Waters said he had permission to sell the cattle guards from his daughter-in-law, but she said that Mr. Waters had been expressly told he could not take or sell them. Mr. Waters was charged with trafficking in stolen property in the first degree, which requires the perpetrator knowingly sell stolen property. At the State's request and over Mr. Waters's objection, the court instructed the jury on the lesser offense of second degree trafficking in stolen property, which requires recklessness by the actor. Because Mr. Waters was either given permission to sell the property or knew he could not take it, there was no affirmative evidence that Mr. Waters acted recklessly. Accordingly, the court improperly instructed the jury on the lesser offense.

Additionally, the court based its restitution award on the price paid by the former dairy farm to purchase the cattle guards in the 1980s, even though the cattle guards were no longer used and had no value

other than the resale price of the metal. These errors require reversal of the conviction and, alternatively, reduction of the restitution award.

B. ASSIGNMENTS OF ERROR.

1. The court erroneously instructed the jury that it could convict Mr. Waters of a lesser offense without affirmative evidence that Mr. Waters committed the lesser crime.

2. The court improperly calculated the restitution loss based on facts not found by the jury and without regard to the fair market value of the property.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A party requesting a lesser included offense instruction must show that affirmative evidence supports a conviction on only the lesser crime. Mr. Waters either had permission to sell the property or he knew he lacked permission. If he acted with knowledge that he lacked permission, he would be guilty of the charged offense of trafficking in stolen property in the first degree. Did the court improperly instruct the jury on an uncharged lesser offense when the evidence did not affirmatively show he acted with the lesser mental state of recklessness required for the inferior degree crime?

2. Restitution must be based on loss incurred by the charged crime and the value of property is predicated on its fair market value. The court valued the lost property based on what it cost the owner to purchase it decades earlier, even though the owner no longer used the property for any purpose and there was no resale value for the property other than the scrap value of its metal. Did the court exceed its authority and improperly calculate the loss incurred?

D. STATEMENT OF THE CASE.

Zach Waters and Kerri Uitbenhowen rented a home in rural Skagit County. RP 34-36, 68.¹ They also had access to a large barn where they stored some items. RP 37, 54. The barn was open and had no doors. RP 37. It contained “old run down stuff” left there by their landlords. RP 37.

Gregory Waters asked his son Zach² if he could take metal pieces laying in piles in the barn and sell them as scrap metal. RP 43. Zach “said no” and told his father that the metal did not belong to him.

¹ The verbatim report of proceedings (RP) from the trial and sentencing are contained in a single volume that includes proceedings held on October 24, 2012; January 7, 8, and 9, 2013; and February 13, 2013.

² For purposes of clarity, Mr. Waters’s son Zach is referred to by his first name. No disrespect is intended.

RP 43.

In October 2011, Zach and his family took a trip to Oregon. RP 39. Upon their return, they thought someone had entered their home because a window was open and some household items such as sponges and garbage bags were missing. RP 40, 50, 58. They also realized metal was missing from the barn. RP 49, 57. Ms. Uitbenhowen called the police. RP 44, 60.

Zach and Ms. Uitbenhowen suspected Zach's father Gregory Waters had taken the metal as well as intruded into their home. RP 58. Mr. Waters told Detective Dan Luvera that Ms. Uitbenhowen had asked him to take the metal and sell it as scrap, then share the proceeds with her. RP 122. Ms. Uitenbenhowen denied that she ever gave Mr. Waters permission to take the metal pieces from the barn. RP 50-51.

Thomas Holtcamp and his mother Mildred owned the property Zach rented, including the barn, which was once used as part of a dairy farm. RP 69. The metal pieces that were piled on the floor of the barn were used as cattle guards, also called hoop stalls. RP 70, 77, 102. They ended their dairy farm business in 1990, rented the home near the barn to others, and gave tenants permission to use the barn. RP 70-71. They rarely ever went to the barn. RP 80.

Thomas Holtcamp said most of the metal cattle guards were purchased in 1984 while some were bought in in 1990s. RP 84. He bent the hoops after he bought them so they would fit in their barn. RP 77. He did not know their current value but the last stalls he purchased in the 1990s were \$30 a piece. RP 78.

The owner of a metal recycling and scrap yard, Brian Parberry, purchased a load of cattle guards from Mr. Waters on October 17, 2011. RP 102-105. Mr. Holtcamp estimated that the number of cattle guards in the truck “could be 50” but he could not tell. RP 84. Mr. Parberry recorded Mr. Waters’s name, copied his driver’s license, and took photographs of the items as part of his regular business practices. Mr. Parberry paid Mr. Waters \$279.30 for the metal. RP 101, 112.

When people bring items that have potential resale value to Mr. Parberry’s recycling center, he will set them aside and sell them. RP 116. He regularly received cattle guards due to the number of local dairy farms that had been shutting down. RP 108, 111. But cattle guards do not have potential resale value and he uses them only as scrap metal. RP 116.

The prosecution charged Mr. Waters with theft in the second degree; possession of stolen property in the second degree; residential

burglary; burglary in the second degree; and trafficking in stolen property in the first degree. CP 13-14.

The jury acquitted Mr. Waters of every charged offense, unanimously agreeing he was not guilty. CP 51-55. However, at the prosecution's request and over defense objection, the court also instructed the jury on the lesser offense of trafficking in stolen property in the second degree. RP 150-51, 153. The jury convicted Mr. Waters of this offense. CP 56.

Based on an offender score of "0", Mr. Waters received a standard range sentence of 30 days with permission for work release or community service as alternatives to jail. CP 59-60. The court also imposed restitution of \$1750, over Mr. Waters's objection. CP 69; RP 168-74. His sentence has been stayed pending appeal. Supp. CP __, sub. no. 67. Pertinent facts are discussed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **The prosecution is not entitled to a jury instruction on an uncharged lesser degree offense without presenting affirmative evidence showing the commission of only the lesser offense**

- a. *The State may obtain an instruction on a lesser degree offense only when the evidence would support a conviction on the lesser offense alone.*

In order for a party to obtain an instruction on an uncharged lesser degree offense, the moving party must meet two conditions: (1) legally the lesser offense is a necessary element of the offense charged, and (2) factually the evidence supports an inference that only the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); RCW 10.61.003; U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 22.

The factual test “[n]ecessarily” requires a “more particularized” factual showing “than that required for other jury instructions.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). “[T]he evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” *Id.*

To determine whether the evidence at trial sufficiently supported giving a lesser offense instruction, the evidence is viewed in the light most favorable to the party requesting the instruction. *Id.* at 455-56. “More specifically, a requested jury instruction on a lesser included or inferior degree offense should be administered ‘[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.’” *Id.* at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) and citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

“Our case law is clear, however, 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.” *Fernandez-Medina*, 141 Wn.2d at 456; *see e.g.*, *State v. Wright*, 152 Wn.App. 64, 71-72, 214 P.3d 968 (2009) (court “may not” instruct on third degree rape as lesser offense when testimony shows either greater offense committed or defendant did not commit crime).

b. *The evidence did not support the State's requested instruction on the lesser offense of trafficking in stolen property in the second degree.*

There was not substantial evidence supporting a rational inference that Mr. Waters committed *only* the lesser uncharged offense to the exclusion of the charged offense. *See Fernandez-Medina*, 141 Wn.2d at 461. The prosecution charged Mr. Waters with first degree trafficking in stolen property, which required proof that he knowingly sold stolen property and knew it was stolen. RCW 9A.82.050(1); CP 16; CP 43-45 (Instructions 21-23).

At the close of the case and over Mr. Waters's objection, the prosecution obtained a jury instruction on the lesser included offense of second degree trafficking in stolen property. CP 48 (Instruction 26); RP 150 (defense objection). This lesser offense is proven by showing the perpetrator recklessly trafficked in stolen property. CP 48; RCW 9A.82.055. Criminal recklessness requires that a person disregarded "a substantial risk that a wrongful act would" occur and such disregard is a "gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010 (1)(c); *Cf.* RCW 9A.08.010(1)(b) (person acts "knowingly" when aware of or should be aware of facts and circumstances defining offense).

Taking the evidence in the light most favorable to the prosecution as the party seeking the lesser offense instruction, the State's witnesses testified unambiguously that they never gave Mr. Waters permission to take the metal cattle guards. Zach Waters said he told Mr. Waters he could not take and sell the metal. RP 43. Zach Waters's wife Kerri Uitbenhowen likewise denied ever giving or even implying that Mr. Waters could take the metal. RP 55. This testimony, if believed, showed that Mr. Waters was aware that he could not take or sell the metal from the barn. If true that Mr. Waters knew he could not sell the metal and he did so anyway, he acted with knowledge as required for first degree trafficking in stolen property.

The only other evidence regarding Mr. Waters's state of mind was his statement to a police officer that Ms. Uitbenhowen gave him permission to take the metal and he shared the proceeds of selling the metal with her. RP 122, 127-28. As further evidence of Mr. Waters's belief that he had actual permission to take the metal, Mr. Waters openly and avowedly took the metal to a scrap yard, offered his own driver's license as proof of his identity and had his truck photographed with the materials in it. RP 105, 113; *see, e.g., State v. Vasquez*, _ Wn.2d _, _ P.3d _, 2013 WL 3864265 (July 25, 2013) (finding

insufficient evidence of forgery in part because the defendant “did not behave as someone who intended to defraud”). Taking this testimony in the light most favorable to the prosecution, it showed that Mr. Waters had permission to take the metal. If he had permission, he did not act recklessly when selling the metal as required for second degree trafficking in stolen property.

No evidence affirmatively showed Mr. Waters recklessly disregarded the risk that he lacked permission to take the property. Either he had permission from Kerri Uitbenhowen or he took the metal after being explicitly told he could not do so. Both scenarios are predicated on Mr. Waters knowing what he was doing, not that he disregarded the risk that he lacked permission to take and sell the metal.

The prosecution is not entitled to a lesser instruction solely on the basis that the jury might disbelieve some of its evidence.

Fernandez-Medina, 141 Wn.2d at 456. 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.

c. *The remedy is reversal of the conviction.*

It is only when the jury has been “properly instructed” on a lesser included offense that a conviction on a lesser offense may stand. *In re Heidari*, 159 Wn.App. 601, 607, 248 P.3d 550 (2011), *aff’d*, 174 Wn.2d 288, 274 P.3d 366 (2012). Because the State did not present evidence supporting a lesser offense instruction, the court lacked authority to instruct the jury on this lesser offense and the conviction must be reversed and vacated.

The jury acquitted Mr. Waters of the charged offense of first degree trafficking in stolen property. CP 55. “Acquittal of an offense terminates jeopardy and prohibits the State from trying the defendant a second time for the same offense.” *State v. Linton*, 156 Wn.2d 777, 784, 132 P.3d 127, 131 (2006); U.S. Const. amend. 5; Const. art. I, § 9. Just as Mr. Waters cannot be retried for first degree trafficking in stolen property following the jury’s acquittal, he may not be retried for the uncharged lesser offense of second degree trafficking when there was insufficient evidence to support the court’s instruction on the lesser offense. *Linton*, 156 Wn.2d at 784; RCW 10.43.050.

2. The court impermissibly imposed restitution in an amount far exceeding the current value for the lost property

a. *Restitution is authorized only for loss incurred by victims as a result of the offense of conviction.*

Restitution is a criminal sanction that it “strongly punitive” in its purpose. *State v. Kinneman*, 155 Wn.2d 272, 280, 119 P.3d 350 (2005). It is part of the sentence that may not be imposed absent affording the accused the fundamental right to due process of law. *State v. Hotrum*, 125 Wn.App. 681, 683, 87 P.3d 766 (2004); *State v. Dedonado*, 99 Wn.App. 251, 254, 991 P.2d 1216 (2000).

Determining the accurate sentence to impose, including restitution, may not be based on mere assertions or unproved allegations. *See State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). Restitution is part of the “quantum of punishment” and the same due process rights attach as to other contested parts of punishment, including being proven to the degree required by law. *State v. Schultz*, 138 Wn.2d 638, 643-44, 980 P.2d 1265 (1999); *State v. Serio*, 97 Wn.App. 586, 987 P.2d 133 (1999).

The restitution statute provides, in pertinent part, that restitution:

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 due to mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling related to the offense.

RCW 9.94A.753(3).

Restitution is permitted only as actual compensation for loss caused by the offense of conviction, not upon speculative claims, general equity concerns, or intangible loss. *State v. Ewing*, 102 Wn.App. 349, 353-54, 7 P.3d 835 (2000); *State v. Johnson*, 69 Wn.App. 189, 191, 847 P.2d 960 (1993). A court abuses its discretion when a restitution order is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). The court acts beyond its sentencing authority when it imposes restitution that is not statutorily authorized. *State v. Moen*, 129 Wn.2d 535, 545-46, 919 P.2d 69 (1996); *accord, Kinneman*, 155 Wn.2d at 283 (on appeal, court may review challenges to the “legal conclusions and determinations by which a [trial] court comes to apply a particular sentencing provision”).

Mr. Waters was convicted of second degree trafficking in stolen property. CP 51-56. He is liable for restitution only for the value of property “proven to be causally related to [his] crime.” *State v. Griffith*, 164 Wn. 2d 960, 967, 195 P.3d 506 (2008).

The trial court acknowledged that the only evidence underlying Mr. Waters’s conviction was the sale of metal to Mr. Parberry’s business on October 17, 2011. RP 170. It limited the restitution ordered to the metal sold at the recycling center on a single date, rejecting the State’s claim that restitution should cover all metal missing from the barn. RP 163-64, 170. However, the court imposed \$1750 in restitution based upon the price the owner paid for the metal cattle guards twenty or thirty years earlier, without regard to their value at the time of the incident. CP 69; RP 174.

- b. *When an item made of metal has no resale value other than as scrap metal, restitution loss is measured by the value of the scrap metal.*

The amount of restitution hinges on evidence establishing the value of the “loss” stemming from the crime of conviction, which is generally related to fair market value at the time of the taking. *State v. Fleming*, 75 Wn.App. 270, 275, 877 P.2d 243 (1994).

Fair market value is the amount of money which a well informed purchaser, willing but not obliged to buy the property would pay, and which a well informed seller, willing but not obliged to sell it would accept, taking into consideration all uses to which the property is adapted and might in reason be applied.

State v. Wilson, 6 Wn.App. 443, 447, 493 P.2d 1252 (1972).

In *Fleming*, the defendant was convicted of taking a gold necklace. 75 Wn.App. at 273. In the time between the taking and the restitution hearing, gold prices rose and the necklace was appraised to be worth more at the restitution hearing than it would have been when it was taken. *Id.* The *Fleming* Court ruled that restitution may be based on the increased value of the gold necklace at the time of the restitution hearing rather than the time of the taking, because the necklace was made of a precious metal and its owner could have taken advantage of the increase in the metal's market value had it not been taken. *Id.* at 275.

Unlike the market value of gold at issue in *Fleming*, the market value of metal cattle guards had not improved over time. Due to the many dairies that had been shutting down, there was no resale value to the metal cattle guards. RP 108, 111. On the contrary, there was a plethora of unwanted cattle guards that shuttered dairy farms sold to the recycling center and had a value only as scrap metal. *Id.* Had there been potential

resale value for the cattle guards, the recycling center would have kept them intact and tried to sell them for its own profit. RP 116. But because cattle guards lack resale value, recycling center owner Brian Parberry had never kept any to sell. RP 116.

The market value of the metal cattle guards at the time of the taking was the \$279.30 Mr. Waters received when he sold them to the metal recycler. RP 112. As a professional seller of metal, the owner of the recycling center was best placed to judge the potential value of the metal and he found it lacked value other than scrap. RP 108, 116.

Rather than value the metal based on its market worth at the time it was taken, the court imposed restitution based on what the owner had paid for the cattle guards years earlier, in the 1980s and 1990s. RP 173-74. When determining value, “a proper deduction must be made for depreciation. Depreciation is not limited to physical wear and tear but it includes economic and functional obsolescence.” *Wilson*, 6 Wn.App. at 450. The trial court did not take depreciation of the guards at issue into account when ordering Mr. Waters to pay restitution at the prices paid for the property years earlier.

The current value of the metal taken from the barn was the value of the metal, because there was no reasonable evidence that the metal guards

had another use. They were custom tailored to the particular needs of the dairy at the time they were ordered, that dairy was no longer in existence and the metal had been left for years in piles in a barn on property rented to a stranger. RP 37, 83. Zach Waters described the property left in the barn by his landlord as “old run down stuff.” RP 37. The Holtcamps had no plan to sell the cattle guards to anyone at the cost for which they were purchased years before or to reinstitute a dairy with those metal guards. There was no testimony about their value other than for the metal itself, sold as scrap.

When property is sold and cannot be recovered in its precise prior form, calculating the loss for purpose of restitution is based on the proceeds of execution. *State v. A.N.W. Seed Corporation*, 116 Wn.2d 39, 45-47, 802 P.2d 1353 (1991). Compensation to the owner for what was taken from him rests on the value of the metal at the time of the incident, which was its \$279.30 value as scrap metal. When an owner is paid fair market value for the present value of the property, he is compensated for his loss as authorized by the restitution statute.

c. *The Sixth Amendment bars the court from imposing restitution based on loss that was not found by the jury.*

The Sixth Amendment bars the judge from acting as fact-finder when imposing punishment based on acts not found by the jury.

Southern Union Co. v. United States, _ U.S. _, 132 S.Ct. 2344, 2356, 183 L.Ed.2d 318 (2012); U.S. Const. amend. 6; Const. art. I, § 22. It applies to facts that mandate a minimum punishment as well as the maximum. *Allyene v. United States*, _ U.S. _, 133 S.Ct. 2151, 2160 (2013) (“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). Restitution is punishment imposed for a conviction. *Kinneman*, 155 Wn.2d at 280.

The only evidence found by the jury was that Mr. Waters had recklessly taken metal left behind in a barn and sold it for \$279.30. CP 56. It did not find the metal had additional value, did not find Mr. Waters intentionally took more than the scrap metal, and did not find Mr. Waters took the metal knowingly that he lacked permission to do so. The court acknowledged there was no testimony that Mr. Waters had taken a certain number of metal gates, so it guessed that he took 50 of them. RP 173. The court may not value the metal based on claims

not proven to the jury or speculation by the court. Based on the jury's verdict, the loss incurred from the metal Mr. Waters sold was \$279.30 dollars and the court exceeded its authority based on the jury's verdict by imposing a greater amount of restitution than underlies Mr. Waters's conviction. The restitution order must be reversed and reduced on remand.

F. CONCLUSION.

For the reasons stated above, Mr. Waters respectfully asks this Court to reverse his conviction for second degree trafficking in stolen property. Alternatively, the court should reverse the restitution order imposed by the court for loss beyond the market value of the scrap metal proven to the jury.

DATED this 31st day of July 2013.

Respectfully submitted,



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Attorneys for Appellant

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

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

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X _____ 