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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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NO. 67856-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARK LYMAN HOUGHTON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JIM ROGERS

**SUPPLEMENTAL BRIEF OF RESPONDENT ADDRESSING
SUPPLEMENTAL ASSIGNMENT OF ERROR**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. STATEMENT OF THE CASE	1
1. BRIEF SUMMARY OF ARGUMENT	1
2. SUBSTANTIVE FACTS	1
C. <u>ARGUMENT</u>	2
THIS ISSUE IS NOT PROPERLY BEFORE THE COURT...	2
D. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Guillen v. Pierce County, 127 Wn. App. 278,
110 P.3d 1184 (2005), rev. denied,
156 Wn.2d 132 (2006)..... 4

State v. Enstone, 137 Wn.2d 675,
974 P.2d 828 (1999)..... 3

State v. Harrington, 56 Wn. App. 176,
782 P.2d 1101 (1989)..... 3, 4

State v. Pockert, 53 Wn. App. 491,
768 P.2d 504 (1989)..... 3

State v. Ryan, 78 Wn. App. 758,
899 P.2d 825, rev. denied,
128 Wn.2d 1006 (1995)..... 3

State v. Tindal, 50 Wn. App. 401,
748 P.2d 695 (1988)..... 2, 3

State v. Wilson, 100 Wn. App. 44,
995 P.2d 1260 (2000)..... 3

State v. Woods, 90 Wn. App. 904,
953 P.2d 834, rev. denied,
136 Wn.2d 1021 (1998)..... 3

Statutes

Washington State:

RCW 9.94A.753 2

A. ISSUES PRESENTED

Is the defendant's challenge to the trial court's restitution order properly before this Court?

B. STATEMENT OF THE CASE

1. BRIEF SUMMARY OF ARGUMENT

By way of a supplemental assignment of error, the defendant challenges the restitution order entered by the trial court. Specifically, he claims that the record does not show that at least some portions of the restitution ordered are related to the crimes of conviction. However, the defendant signed the restitution order, never raised an objection, and thus the issues he complains were never addressed in the trial court. Thus, this issue is not properly before the court.

2. SUBSTANTIVE FACTS

The defendant was convicted of Arson in the First Degree and Filing a False Insurance Claim. CP 54-55. He was sentenced on October 7, 2011. 22RP. As part of the State's sentencing recommendation, the prosecutor stated that "we ask for restitution in the amount of \$42,519.81. Again, the parties have examined the

documentation of [sic]. Mr. Palmer [defense counsel], signed the restitution order as to form.” 22RP 2.¹ Defense counsel signed the restitution order with the notation “as to form.” CP 67.

During the course of the entire sentencing hearing, the defendant did not object to the restitution amount or request a restitution hearing. The restitution order defense counsel signed was presented to the court, whereupon the judge signed the order as part of the defendant’s sentence. 22RP 14; CP 67.

C. ARGUMENT

THIS ISSUE IS NOT PROPERLY BEFORE THE COURT

RCW 9.94A.753(5) provides that restitution “shall be ordered whenever the offender is convicted of any offense which results in injury to any person or damage to or loss of property.” The general rule is that restitution may be ordered for losses incurred as a result

¹ In stating that he and defense counsel had examined “the documentation,” the prosecutor was likely referring to a “Restitution Documents” packet prepared by the prosecutor’s office victim assistance unit. At the request of appellate counsel, the State filed the Restitution Documents packet with the superior court on November 14, 2012. See CP 9. While the State does not contest that this was likely the packet of information the parties were referring, it is unknown whether the trial judge had a copy, or had seen a copy, at the time of sentencing. See State v. Tindal, 50 Wn. App. 401, 403 n.1, 748 P.2d 695 (1988).

of the offense charged. State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 834, rev. denied, 136 Wn.2d 1021 (1998). A sentencing court has the discretion to order a defendant to pay restitution as long as there is a causal connection between the crime and the injuries for which compensation is sought. State v. Enstone, 137 Wn.2d 675, 682-83, 974 P.2d 828 (1999); State v. Wilson, 100 Wn. App. 44, 995 P.2d 1260 (2000).

“If the defendant acknowledges or agrees to the amount of restitution, an evidentiary restitution hearing is not required.” State v. Ryan, 78 Wn. App. 758, 763, 899 P.2d 825, rev. denied, 128 Wn.2d 1006 (1995). “If a defendant fails to object, the amount of restitution is deemed acknowledged.” Ryan, 78 Wn. App. at 763 (citing State v. Pockert, 53 Wn. App. 491, 498, 768 P.2d 504 (1989) and Tindal, 50 Wn. App. at 403). When a defendant fails to challenge or fails to object to the restitution amount below, the issue may not be raised on appeal. State v. Harrington, 56 Wn. App. 176, 181, 782 P.2d 1101 (1989).

Harrington pled guilty to possession of a stolen car. On appeal, he claimed that the amount of restitution order was inappropriate because the repairs to the victim’s car exceeded the

fair market value of the car. But he never challenged this part of the restitution order in the trial court. In no uncertain terms, this Court ruled that Harrington's failure to object below precluded appellate review of the issue. The "failure to raise this [restitution] issue below," this Court stated, "precludes appellate review." Harrington, 56 Wn. App. at 181.

That is the exact situation that exists here. While defense counsel's signing of the restitution order "as to form," is arguably not determinative,² the defendant raised absolutely no challenge or objection to entry of the signed order, and he never asked for any type of evidentiary hearing. Thus, he is precluded from raising this issue on appeal.

D. CONCLUSION

For the reasons cited above, this Court should refuse to consider the defendant's argument concerning the trial court's restitution order. In the event this Court does reach the issue, this Court should remand the case back to the trial court to fully consider the arguments being raised for the first time on appeal.

² See Guillen v. Pierce County, 127 Wn. App. 278-288, 110 P.3d 1184 (2005), rev. denied, 156 Wn.2d 132 (2006).

The record is insufficient to determine the validity or substance of the defendant's arguments because he failed to object below.

DATED this 9 day of January, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent Addressing Supplemental Assignment of Error , in STATE V. HOUGHTON, Cause No. 67856-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

01-09-13
Date