

70243-2

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NO. 70243-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GRUNDY,

Appellant.

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COURT OF APPEALS  
DIVISION ONE

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

The Honorable Ira J. Uhrig, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

JENNIFER J. SWEIGERT  
Attorney for Appellant

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The court erred in ordering appellant to pay \$10,187.53 in restitution without substantial evidence in the record.

Issue Pertaining to Supplemental Assignment of Error

A restitution order must be based on easily ascertainable damages, not speculation. In this case, a restitution hearing was contemplated but never held. Nonetheless, substantial amounts of restitution were ordered in the judgment and sentence. When there was no evidence presented whatsoever regarding the amount of restitution imposed, should this Court reverse the restitution award?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Towards the end of the sentencing hearing in this case, the court stated, "Full restitution will be required. If we need a hearing to establish what that amount is, I don't think we can know today." RP 767. The prosecutor responded, "We have a pretty good start but there was some details that need to be cleaned up." RP 767. A few minutes later, after discussing other items, the prosecutor asked, "Do you have any thoughts on when you want to do the restitution hearing?" RP 773. Defense counsel responded, "when it's convenient for you guys to get everything together." RP 773. The prosecutor replied, "We'll be in touch, then, your Honor, with that." RP 773. This conversation was the only mention of restitution in the

proceedings below. Nevertheless, the judgment and sentence orders Grundy to pay \$10,187.53 in restitution. CP 122-23, 127-28.

C. SUPPLEMENTAL ARGUMENT

THE RESTITUTION ORDER SHOULD BE VACATED BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE OF THE AMOUNT OF LOSS.

A restitution order must be based on “easily ascertainable damages.” RCW 9.94A.753 (3).<sup>1</sup> “Restitution is an integral part of sentencing, and it is the State’s obligation to establish the amount of restitution.” State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000). 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).

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). “Preponderance of the evidence” means that accounting for all the evidence, the assertion must

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<sup>1</sup> RCW 9.94A. 753 (3) provides in relevant part:

Except as provided in subsection (6) of this section, 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.

be more probably true than not true. State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009).

Although the rules of evidence do not apply at restitution hearings, the State's proof must meet due process requirements, such as providing the defendant with an opportunity to refute the evidence presented, and being reasonably reliable. State v. Strauss, 119 Wn.2d 401, 418-19, 832 P. 2d 78 (1992); State v. Pollard, 66 Wn. App. 779, 784-85, 834 P.2d 51 (1992). On appeal, restitution orders are reviewed for abuse of discretion. State v. Tobin, 161 Wn. 2d 517, 523, 166 P.3d 1167 (2007). The record must permit a reviewing court to determine "exactly what figure is established by the evidence." Pollard, 66 Wn. App. at 785.

The record in this case contains no evidence whatsoever supporting the amount of restitution ordered. Apparently, the parties contemplated a restitution hearing, but one was never held. RP 767, 773. The restitution order must be vacated because the State failed to meet its burden to prove the amount of restitution by a preponderance of the evidence. Dedonado, 99 Wn. App. at 257.

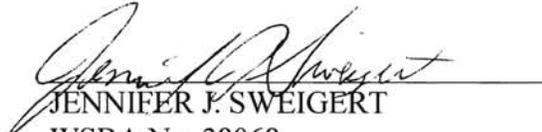
D. CONCLUSION

In addition to the errors already identified in the Brief of Appellant, the restitution award should be vacated.

DATED this 1<sup>st</sup> day of November, 2013.

Respectfully submitted,

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Attorney for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70243-2-1
	)	
MIKE GRUNDY,	)	
	)	
Appellant.	)	

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**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 5<sup>TH</sup> DAY OF NOVEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL 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] WHATCOM COUNTY PROSECUTOR'S OFFICE  
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- [X] MIKE GRUNDY  
2917 S. WILLOW ST  
SEATTLE, WA 98108

**SIGNED** IN SEATTLE WASHINGTON, THIS 5<sup>TH</sup> DAY OF NOVEMBER 2013.

x *Patrick Mayovsky*