

No. 71699-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LARRY KWANT,

Appellant.

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

BRIEF OF APPELLANT

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON



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A. ASSIGNMENTS OF ERROR

The trial court erred in ordering restitution.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Restitution must be based on losses caused by the crime of conviction. Here, the trial court imposed restitution caused by an act occurring prior to the charging period and for which Larry Kwant was not convicted. Did the court exceed its authority in imposing restitution?

2. The Sixth Amendment guarantees a jury determination of any fact which increases the punishment for an offense. Restitution is punishment. A court may only impose restitution where it finds easily ascertainable damages causally connected to the offense. Because restitution may only be imposed where that additional finding is made, must a jury determine such damages?

3. Article I, section 21 guarantees the “right to a jury shall remain inviolate.” The Supreme Court has held that guarantee requires a jury determination of damages. Does Article I, section 21 require a jury determination of the damages for purposes of restitution?

C. STATEMENT OF CASE

Larry Kwant obtained a driver's license using the name of his deceased grandfather Anton T. Hovland. CP 39. Using that name in September 2009, Mr. Kwant was added to the State Farm automobile insurance policy belonging to his mother, Sherryl Brongil. CP 41.

In August 2010, Mr. Kwant was involved in an accident while driving his mother's car. CP 40-41. Ms. Brongil made a claim from the insurance for damages to her car. State Farm paid her the replacement value of the car. CP 41.

Ms. Brongil was convicted of insurance fraud. Mr. Kwant pleaded guilty to one count of second degree identity theft. CP 21-32. The trial court imposed restitution of \$18,417.21. CP 69.

D. ARGUMENT

1. The trial court exceeded its statutory authority in imposing restitution in this case.

a. *Restitution is a strictly statutory remedy authorized only for damages causally connected to the crime of conviction.*

“The authority to impose restitution is not an inherent power of the court, but is derived from statutes.” *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). A restitution order is void when the trial court deviates from the parameters of the restitution statute. *State*

v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000); *State v. Hefa*, 73 Wn. App. 865, 866-67, 871 P.2d 1093 (1994).

RCW 9.94A.753 provides, in pertinent part, restitution:

(3) . . . 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. . . .

(5) Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property. . . .

Restitution is generally permitted only for loss that is causally connected to the offense of conviction. *State v. Kinneman*, 155 Wn.2d 272, 286, 119 P.3d 350 (2005); *State v. Woods*, 90 Wn. App. 904, 907, 953 P.2d 835 (1998). Restitution may not be imposed for a “‘general scheme,’ or acts, ‘connected with’ the crime charged, or uncharged crimes unless the defendant enters into an express agreement.” *Kinneman*, 155 Wn.2d at 286 (quoting *Woods*, 90 Wn. App. at 907-08).

b. *State Farm’s losses were not causally connected to Mr. Kwant’s crime.*

The State based its restitution request upon its contention that but for Mr. Kwant providing false information when he applied for insurance, State Farm would not have insured him and thus would not have paid for damages he caused to the vehicle. 3/5/14 RP 10-11. But Mr. Kwant was not convicted of identity theft for making a false

application for insurance. Indeed, that act occurred more than one year before the crime to which he pleaded guilty.

Mr. Kwant pleaded guilty to committing identity theft between August 27, 2010 to December 20, 2010. CP 32. August 27, 2010, was the date of the car accident. CP 39. Mr. Kwant was already insured at that point. In fact, Mr. Kwant was added to Ms. Brongil's policy on September 16, 2009. CP 41. The causal connection requirement exists between the crime of conviction and restitution imposed. *Kinneman*, 155 Wn.2d at 286; *Woods*, 90 Wn. App. at 907-08. Because State Farm's damages were caused by an act that occurred prior to Mr. Kwant's offense, his crime of conviction cannot be the cause of those damages. *State v. Tettters*, 81 Wn. App. 478, 914 P.2d 784 (1996). In *Tettters* this Court concluded a trial court could not impose restitution for losses occurring before the criminal act for which the defendant was convicted. *see also*, *State v. Mark*, 36 Wn. App. 428, 433, 675 P.2d 1250 (1984) (although criminal acts and losses continued beyond charging period, restitution was limited to losses occurring during the charging period).

Thus, the court erred in concluding Mr. Kwant's crime caused State Farm's losses.

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

Restitution is a criminal sanction that it “strongly punitive” in its purpose. *Kinneman*, 155 Wn.2d at 280. Restitution 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 correct sentence to impose, including restitution, requires more than 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 ascertainable-damages and causation requirements of RCW 9.94A.753 preclude restitution for speculative and intangible losses. *Kinneman*, 155 Wn.2d at 285. Instead, the State must offer evidence that “affords a reasonable basis for estimating loss and does not subject

the trier of fact to mere speculation or conjecture.” *State v. Hughes*, 154 Wn.2d 118, 154, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

The Sixth Amendment’s right to a jury guarantees the right to have a jury find every fact essential to punishment beyond a reasonable doubt. U.S. Const. amend. VI; *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi, 530 U.S. at 490 (internal citations omitted). This rule preserves the “historic jury function” of “determining whether the prosecution has proved each element of an offense beyond a reasonable doubt.” *Oregon v. Ice*, 555 U.S. 160, 163, 129 S. Ct. 711, 172 L. Ed. 2d 51 (2009). Concluding the historical function of the jury included determining the value of a financial penalty or fine, the Supreme Court has recently made clear the criminal fines are subject to the rule of

Apprendi. *Southern Union Co. v. United States*, __ U.S. __, 132 S. Ct. 2344, 2354, 183 L. Ed. 2d 318 (2012).

Restitution is punishment imposed for a conviction. *Kinneman*, 155 Wn.2d at 280; *see also*, *Pasquantino v. United States*, 544 U.S. 349, 365, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005) (“The purpose of awarding restitution in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct”); *State v. Edelman*, 97 Wn. App. 161, 166, 984 P.2d 421 (1999) (“... restitution is part of an offender’s sentence and is primarily punitive in nature”).

In *Southern Union*, the defendant corporation was subject to a \$50,000 fine for each day it was in violation of the Resource Conservation and Recovery Act. 132 S. Ct. at 2349. The defendant argued that imposition of anything more 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. In doing so, the Court rejected any effort to distinguish between the punishment of incarceration and financial punishments. *Id.* at 2352-53. The Court noted the “core concern” of *Apprendi* is the reservation to the jury of “the determination of facts that warrant punishment.” *Id.* at 2350 (citing *Ice*, 555 U.S. at 170). “That concern applies whether the sentence is a criminal fine, or

imprisonment or death.” *Southern Union*, 132 S. Ct. at 2350. The Court specifically recognized *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. That is precisely how restitution is determined under RCW 9.94A.753.

Kinneman reasoned restitution did not trigger the Sixth Amendment’s protections because while RCW 9.94A.753 requires a court to impose restitution, it permits a court to forego restitution in extraordinary circumstances, and the statute does not set a maximum amount. 155 Wn.2d at 282. Thus the Court reasoned RCW 9.94.753 was “more like the advisory Federal Sentencing Guidelines after *Booker* [*v. United States*, 543 U.S. 220, 245, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)].” *Kinneman*, 155 Wn.2d at 281.

The conclusion that the absence of a maximum in RCW 9.94A.753 avoids any Sixth Amendment implications misses too much. Restitution is permissible only if the State proves “easily ascertainable damages for injury to or loss of property” by a preponderance of the evidence. *Hughes*, 154 Wn.2d at 154. To use the lexicon of *Apprendi*, the “maximum” permitted by RCW 9.94A.753 is \$0 unless there is a determination of “easily ascertainable damages.” Moreover, the statute

sets an additional cap when it provides “restitution shall not exceed double the amount of the offender’s gain or the victim's loss from the commission of the crime.” RCW 9.94A.753(3).

Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring[v. Arizona, 536 U.S. 584 (2002)]*), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

Blakely, 542 U.S. at 305. The fact that the State bears the burden of proving the amount of restitution illustrates that a court may not impose any amount absent an additional factual determination. Because that factual determination results in an increase in punishment it must be made by the jury.

Even if the restitution determination merely fixed a minimum punishment the Sixth Amendment is still implicated. *Alleyne v. United States*, _ U.S. _, 133 S. Ct. 2151, 2160, 186 L. Ed.2d 314 (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).

In addition, the fact that a judge has discretion in determining the amount of restitution is not the same as saying a judge need not

impose restitution at all. Nothing in the statute would permit a judge to impose anything less than the actual damages proved in a nonextraordinary case. Further, a judge's discretion to decline to impose restitution in "extraordinary circumstances" is irrelevant to the inquiry. There is no published case explaining what "extraordinary circumstance" might mean. More importantly, a judge's ability to deviate below the required sentence does not change the elemental nature of facts relied upon to increase the sentence. For example, the SRA has always afforded judges the ability to impose a sentence below the standard range based upon mitigating circumstances and to do so without a jury finding. *See* RCW 9.94A.535(1). But the existence of that discretion does not alter the elemental nature of any fact which increases the potential sentence. If that were the case, the SRA would not trigger the Sixth Amendment at all. *Blakely* held otherwise. It is clear that the existence of discretion to impose a lesser sentence is not determinative of whether the Sixth Amendment applies to facts which increase the sentence.

In addition, when *Booker* concluded the federal guidelines were advisory, it did not mean a court had discretion in limited cases to deviate from an otherwise required sentence, or that certain provisions

afforded courts discretion within the guidelines. Instead, what the Court meant by advisory was that the sentencing court was not bound by the statute at all. *Booker*, 543 U.S. at 245. That is not the case with RCW 9.94A.753.

RCW 9.94A.753 requires restitution be imposed in all but the undefined extraordinary circumstances. Indeed, in any case in which the 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" in any way much less in the way the federal sentencing guidelines are advisory.

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.

A jury finding is not necessary where a defendant pleads guilty and stipulates to the relevant facts. *Blakely*, 542 U.S. at 310; *State v. Suleiman*, 158 Wn.2d 280, 289, 143 P.3d 795 (2006). Such a stipulation must include the factual basis for the additional punishment and stipulate that record supports such a determination. *Suleiman*, 158

Wn.2d at 292. Here, Mr. Kwant pleaded guilty to second degree identity theft. CP 6-15. That plea does not include any mention of the actual value of the victim's loss or Mr. Kwant's gain except to say he did not obtain any item in valued in excess of \$1500. Mr. Kwant agreed to pay restitution as part of his plea. CP 56. But again, did not agree to any amount. Thus, his plea does not constitute a waiver under *Blakely*. *Suleiman*, 158 Wn.2d at 289. Mr. Kwant did not waive his right to a jury determination of damages.

3. The Washington Constitution guarantees a jury determination of damages.

Article I, section 21 of the Washington Constitution provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The Supreme Court held the assurance that the right "shall remain inviolate" requires a jury determination of damages.

Washington has consistently looked to the jury to determine damages as a factual issue, especially in the area of noneconomic damages. This jury function receives constitutional protection from article 1, section 21.

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 648, 771 P.2d 711, amended, 780 P.2d 260 (1989). “The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name.” *State v. Strasburg*, 60 Wash. 106, 116, 110 P. 1020 (1910) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325, 18 L. Ed. 356 (1866)). “In other words, a constitutional protection cannot be bypassed by allowing it to exist in form but letting it have no effect in function.” *Sofie*, 112 Wn.2d at 660. Thus, the Court reasoned the jury’s function as fact finder could not be divorced from the ultimate remedy provided. “The jury’s province includes determining damages, this determination must affect the remedy. Otherwise, the constitutional protection is all shadow and no substance.” *Sofie*, 112 Wn.2d at 661.

In *Sofie* the Court held the legislature could not remove that traditional function from the jury by means of a statute that capped noneconomic damages. Similarly, nothing permits the legislative effort to remove this damage-finding function from the jury simply by terming such damages restitution. Restitution is limited to damages causally connected to the offense. RCW 9.94A.753. The damages at issue are no different than the damages at issue in *Sofie*, the value of the loss suffered as a result of the acts of another. To preserve “inviolable”

the right to a jury trial, Article I, section 21 must afford a right to a jury determination such damages.

E. CONCLUSION

For the reasons above this Court must reverse the restitution order entered in this case.

Respectfully submitted this 29th day of August 2014.



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)	
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)	NO. 71699-9-I
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)	
LARRY KWANT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING 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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