

NO. 34719-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT C. DINGMAN,

Appellant.

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

The Honorable Linda C. J. Lee

REPLY BRIEF OF APPELLANT AND CROSS-RESPONSE

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT IN REPLY/CROSS-RESPONSE 1

B. ARGUMENT IN REPLY 3

1. UNDER THE LAW OF THE CASE DOCTRINE, THE STATE ASSUMED THE BURDEN OF PROVING DINGMAN (1) HAD INTENT TO DEPRIVE AND (2) EXERTED UNAUTHORIZED CONTROL FOR THE DURATION OF THE CHARGING PERIOD. WITH RESPECT TO COUNTS 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, AND 46, THE STATE DID NOT MEET THIS BURDEN 3

2. GIVEN THE STATE’S CONCESSION THAT IT INTENDED TO PROSECUTE A “CONTINUING COURSE OF CONDUCT”, THIS COURT SHOULD FIND THE PROSECUTIONS FOR THEFT AND MONEY-LAUNDERING BASED ON THE SAME ACTS AND TRANSACTIONS VIOLATE DOUBLE JEOPARDY PROHIBITIONS..... 6

3. DINGMAN’S EXCEPTIONAL SENTENCE MUST BE VACATED WHERE SUBSTANTIAL EVIDENCE DID NOT SUPPORT EACH OF THE ALTERNATIVE MEANS ALLEGED OF COMMITTING A MAJOR ECONOMIC OFFENSE 8

4. *CORIA* DOES NOT CONTROL WHETHER THE “MULTIPLE VICTIM” AGGRAVATING CIRCUMSTANCE MAY BE APPLIED TO A MARITAL COMMUNITY..... 10

5. THE STATE’S STEADFAST REFUSAL TO PROVIDE THE DEFENSE WITH A COPY OF DINGMAN’S HARD DRIVE EXCEPT IN A FORMAT THAT THE DEFENSE EXPERT COULD NOT READ DEPRIVED DINGMAN OF MEANINGFUL ACCESS TO THE EVIDENCE, IN VIOLATION OF HIS RIGHT TO A DEFENSE..... 12

C. RESPONSE TO CROSS-APPEAL	16
1. THIS COURT SHOULD DECLINE TO CONSIDER THE STATE’S CLAIMS WHERE THE STATE HAS FAILED TO ASSIGN ERROR AS REQUIRED BY RAP 10.3(a)(4)	16
2. EVEN ASSUMING THIS COURT CHOOSES TO REACH THE MERITS OF THE STATE’S CLAIMS, THE DISMISSAL OF CRIMINAL CHARGES FOR INSUFFICIENT EVIDENCE AFTER THE STATE HAS RESTED IS TANTAMOUNT TO A JUDGMENT OF ACQUITTAL, AND RESURRECTION OF THE CHARGES VIOLATES DOUBLE JEOPARDY	18
3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE STATE’S REQUEST FOR RESTITUTION TO FOUR SEASONS	20
a. A restitution award is reviewable only for a manifest abuse of discretion	20
b. The trial court properly exercised its discretion in not ordering restitution to Four Seasons where the State did not meet its burden of proving the amount sought by a preponderance of the evidence	21
D. CONCLUSION	25

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Ang v. Martin</u> , 154 Wn.2d 477, 114 P.3d 637 (2005)	16, 17
<u>In re Personal Restraint of Jeffries</u> , 110 Wn.2d 326, 752 P.2d 1338 (1988)	8-10
<u>State v. Boyd</u> , 160 Wn.2d 424, 158 P.3d 54 (2007)	12, 14, 15
<u>State v. Coria</u> , 146 Wn.2d 631, 48 P.3d 980 (2002)	11
<u>State v. Enstone</u> , 137 Wn.2d 675, 974 P.2d 828 (1999)	21, 24
<u>State v. Hickman</u> , 1235 Wn.2d 97, 954 P.2d 900 (1998)	3, 4
<u>State v. Joy</u> , 121 Wn.2d 333, 851 P.2d 654 (1993)	17, 20
<u>State v. Kinneman</u> , 155 Wn.2d 272, 119 P.3d 350 (2005)	21
<u>State v. Korum</u> , 157 Wn.2d 614, 141 P.3d 13 (2006)	16
<u>State v. Lee</u> , 128 Wn.2d 151, 904 P.2d 1143 (1995)	i
<u>State v. Leyda</u> , 157 Wn.2d 335, 138 P.3d 610 (2006)	12
<u>State v. Moen</u> , 129 Wn.2d 535, 919 P.2d 69 (1996)	20
<u>State v. Olson</u> , 126 Wn.2d 315, 893 P.2d 629 (1995)	16, 18
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984)	1, 5-7
<u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007)	8, 9
<u>State v. Womac</u> , 160 Wn.2d 643, 160 P.3d 40 (2007)	7, 12, 19

Washington Court of Appeals Decisions

<u>State v. Fleming</u> , 75 Wn. App. 270, 877 P.2d 243 (1994)	21
<u>State v. Goodman</u> , 108 Wn. App. 355, 30 P.3d 516 (2001)	11
<u>State v. Hayes</u> , 81 Wn. App. 425, 914 P.2d 788 (1996)	4
<u>State v. Jensen</u> , 125 Wn. App. 319, 104 P.3d 717 (2005)	3, 4
<u>State v. Matuszewski</u> , 30 Wn. App. 714, 637 P.2d 994 (1981)	19
<u>State v. McReynolds</u> , __ Wn. App. __, __ P.3d __, No. 24741-4-III, 2008 Wash. App. LEXIS 290 (Slip Op. February 5, 2008)	19, 20
<u>State v. Turner</u> , 102 Wn. App. 202, 6 P.3d 1226 (2000)	12
<u>State v. Woods</u> , 90 Wn. App. 904, 953 P.2d 854 (1998)	21

Washington Constitutional Provisions

Const. art. I, § 9	12, 19
--------------------------	--------

United States Supreme Court Decisions

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306
(1932)..... 7
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674
(1984)..... 15
United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51
L.Ed.2d 642 (1977)..... 19, 20

United States Constitutional Provisions

U.S. Const. amend. 5 12, 19
U.S. Const. amend. 6 12, 15

Statutes

RCW 9.94A.535..... 9
RCW 9.94A.753..... 21, 22, 24
RCW 9A.08.010..... 5
RCW 9A.56.020..... 5

Rules

CrR 4.7..... 12, 14, 15
RAP 10.3..... 2, 16, 18, 20

A. SUMMARY OF ARGUMENT IN REPLY/CROSS RESPONSE.

Robert C. Dingman appeals his convictions and exceptional sentence stemming from a series of unfulfilled contracts his business, Quality Home Enclosures (QHE) entered with a number of homeowners. Dingman's principal argument on appeal with respect to the theft counts is that under the "law of the case" doctrine, the State assumed the burden of proving he exerted unauthorized control and possessed the intent to deprive when he entered the contracts with his customers and that he maintained this intent "through" the lifetime of the contract. As the State did not present sufficient evidence to prove these added elements of the offenses, Dingman is entitled to reversal and dismissal of his convictions. Even if the State did not assume this burden, Dingman is nonetheless entitled to retrial on many of the charged thefts because multiple acts could have supported the charges but the court did not issue a Petrich¹ instruction to the jury.²

Dingman also challenges the court's unreasonable limitation on pretrial discovery, the double jeopardy violation arising from his prosecutions for theft and money laundering based on the same acts, and the exceptional sentence imposed following his convictions.

¹ State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

² As is discussed in argument B(1) below, the State apparently concedes Dingman's "law of the case" argument, so no further argument on the Petrich issue is provided in this reply/cross-response brief.

In response, without acknowledging or trying to distinguish the application of the “law of the case” doctrine, the State concedes each count of theft was based on a contract. The State maintains it met its burden of proving intent to steal because Dingman knew or should have known he could not perform the work he contracted to do. As knowledge does not equate to intent, this Court should find the State did not meet its burden and dismiss the relevant counts.

The State has filed a cross-appeal challenging the trial court’s dismissal, after the State rested, of a number of the counts for insufficient evidence. The State also complains the trial court abused its discretion in not awarding restitution to Four Seasons Sunrooms (“Four Seasons”), a nationwide supplier of sunrooms that provided sunrooms to many of Dingman’s disappointed customers.

As a preliminary matter, the State has failed to assign error as required by RAP 10.3(a)(4), thus this Court should decline to hear its arguments. Even if this Court reaches the merits of the State’s claims, double jeopardy bars the resuscitation of the charges dismissed by the trial court after the State rested, and as the State concedes, the restitution order can only be vacated for a manifest abuse of discretion. The trial court acted well within its discretion in denying the State’s request for restitution to Four Seasons.

B. ARGUMENT IN REPLY.

1. UNDER THE LAW OF THE CASE DOCTRINE, THE STATE ASSUMED THE BURDEN OF PROVING DINGMAN (1) HAD INTENT TO DEPRIVE AND (2) EXERTED UNAUTHORIZED CONTROL FOR THE DURATION OF THE CHARGING PERIOD. WITH RESPECT TO COUNTS 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, AND 46, THE STATE DID NOT MEET THIS BURDEN.

The “law of the case” doctrine imposes on the State the burden of proving otherwise unnecessary elements of an offense where such elements are included without objection in the “to convict” instruction. State v. Hickman, 1235 Wn.2d 97, 102, 954 P.2d 900 (1998). Here, the State assumed the burden of proving Dingman possessed the intent to deprive and exerted unauthorized control for purposes of each of the theft counts by alleging that Dingman committed theft on or about the date the contract was entered “through” another date. Hickman, 135 Wn.2d at 102; State v. Jensen, 125 Wn. App. 319, 325-26, 104 P.3d 717 (2005).

In its response, the State does not address or acknowledge the applicability of the “law of the case” doctrine. Br. Resp. at 34-47. The State does not comment on whether it assumed the burden of proving additional elements by virtue of the “to convict” instructions. The State’s sole response to Dingman’s argument is a citation to State v. Hayes, 81

Wn. App. 425, 914 P.2d 788 (1996),³ which the State alleges supports a loose construction of the “on or about” language contained in the “to convict” instructions. Br. Resp. at 35.

But Hayes considered the sufficiency of the information, not the law of the case. Hayes, 81 Wn. App. at 432-33. More importantly, Division One decided Hayes two years before the Washington Supreme Court issued its decision in Hickman, and its holding is of questionable validity in light of that decision.

In any event, the State apparently concedes it assumed the burden of proving each count of theft encompassed the entirety of the contract.

The State acknowledges,

In this case, the appellant was charged with theft from each of the victims for the time period covered by the payment of the money to the appellant and/or his business, to the time when it could be established that the project had not been completed. . . The theft charges were based upon the contract which was entered into by the victims and the appellant’s business.

³ The State also cites Jensen, Br. Resp. at 35, but rather than announcing a rule, the relevant portion of Jensen summarizes the State’s claim in response, and thus fails to provide the authority the State seeks. See Jensen, 125 Wn. App. at 325. Importantly, Jensen agreed with the defendant’s “law of the case” argument, but found the State had met its burden of presenting sufficient evidence to support the acts occurred within the charging period. Id. at 325-26. A different result is warranted here.

Br. Resp. at 35; see also, Br. Resp. at 48-49 (asserting no Petrich instruction was required because the State alleged a continuing course of conduct).

The State's theory, apparently, is that Dingman knew or should have known that he would have been unable to build the sunrooms he sold to each complainant, and therefore his entering into a contract to build the sunrooms amounted to theft. See Br. Resp. at 47 ("At the time the appellant entered the contract with the Sharpes, he was well aware of the dire financial state of his business. The testimony . . . clearly established that the appellant knew he would not be able to honor his obligations under the contracts he entered into with the victims."). Given that Dingman did successfully fulfill his contractual obligations for many clients between June 2001 and October 2002, the State's theory that he should have known he could not do the work is not borne out by the evidence. 29RP 2884, 2913, 2922.

More importantly, even assuming the State's premise to be correct, under the specific intent requirement of the theft statute, the State had to prove Dingman had the intent to deprive when he entered the contracts, not simply that he knew or should have known he might not be able to fulfill them. RCW 9A.56.020(1)(a); compare RCW 9A.08.010(1)(a) with RCW 9A.08.010(1)(b). Even viewed in the light most favorable to the

State, the evidence does not establish an intent to deprive, in light of Dingman's partial performance under many of the contracts. A businessman who knows his finances are in dire straits but is hopeful he can salvage his company and reputation, and who continues to engage in unwise business transactions with the hope of reversing his fortunes, does not commit theft by continuing to do business. While many of Dingman's clients might have a civil claim for liability under the State's theory, the State has not met the more onerous burden of proving a specific intent to steal. The theft convictions in counts 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, and 46 should be dismissed.

2. GIVEN THE STATE'S CONCESSION THAT IT INTENDED TO PROSECUTE A "CONTINUING COURSE OF CONDUCT", THIS COURT SHOULD FIND THE PROSECUTIONS FOR THEFT AND MONEY-LAUNDERING BASED ON THE SAME ACTS AND TRANSACTIONS VIOLATE DOUBLE JEOPARDY PROHIBITIONS.

With respect to Dingman's argument that he was deprived a unanimous verdict, Br. App. at 84-89, the State claims no Petrich instruction was required because the events constituted a "continuing course of conduct." Br. Resp. at 48-49. The State asserts,

Since the appellant's actions and promises were intended to obtain and then keep the victims' money without providing them with the project for which they had contracted, this continuing course of conduct does not require the giving of a Petrich instruction.

Br. Resp. at 49 (emphasis added).

With respect to Dingman’s double jeopardy argument, the State makes an opposite and irreconcilable claim: that the act which the State has chosen to characterize as money laundering is a “separate transaction” from the theft. See Br. Resp. at 50-52. The State cannot have it both ways. If the “theft” is a continuing course of conduct that embraces all actions under the contract, then there is no divisible act that constitutes money laundering.⁴ The prosecutions comprise the “same evidence” under Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and violate double jeopardy.

That the money laundering statute contains a different element than the theft statute, see Br. Resp. at 10, is of no moment. “Washington courts ... have occasionally found a violation of double jeopardy *despite* a determination that the offenses involved clearly contained different legal elements.” State v. Womac, 160 Wn.2d 643, 652, 160 P.3d 40 (2007) (emphasis in original). Here, as the State concedes, the evidence is entirely intertwined and dependent on the same facts. Br. Resp. at 48-49. This Court should conclude the multiple convictions violate double

⁴ By the same token, if the State intended to prosecute “separate transactions,” then Dingman was deprived a unanimous verdict by the court’s failure to issue a Petrich instruction.

jeopardy prohibitions and vacate Dingman's convictions for money laundering in counts 11, 15, 17, 19, 38, 41, 43, 45, 48, 51, and 53.

3. DINGMAN'S EXCEPTIONAL SENTENCE MUST BE VACATED WHERE SUBSTANTIAL EVIDENCE DID NOT SUPPORT EACH OF THE ALTERNATIVE MEANS ALLEGED OF COMMITTING A MAJOR ECONOMIC OFFENSE.

The State concedes that the "major economic offense" aggravating circumstance operated like an element and had to be proven beyond a reasonable doubt. Br. Resp. at 55. The State also concedes that in an alternative means case, if one of the means is not supported by substantial evidence, then the defendant is deprived a unanimous verdict. Br. Resp. at 55-56.

The State contends, however, that in this case, the instruction for the aggravating circumstance was definitional and so unanimity was not required. Br. Resp. at 57-59. The State is wrong.

Contrary to the State's claim, the "major economic offense" aggravating circumstance neither presents a "disputed disjunctive" nor a "means within a means." See State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) and In re Personal Restraint of Jeffries, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988). Instead, the aggravating circumstance can be proven in two ways: by proving there were multiple incidents per victim

or that there were multiple victims. RCW 9.94A.535(3)(d)(i); Smith, 159 Wn.2d at 784.

The Smith Court declined to find that a jury instruction setting forth the several common law definitions of assault created alternative means, as the Legislature already established statutory alternative means of committing the offense. Id. at 786. In so holding, the Court recited with approval a number of cases in which the courts found alternative means had been created by statutory language. Id. at 785-86 (citing statutes and cases). Smith thus undermines the State's claims and supports Dingman's argument that "multiple incidents per victim" and "multiple victims" are alternative means of committing a major economic offense.

Jeffries, also cited by the State, is readily distinguishable. In that case, the defendant tried to parse out all the disjunctives for the aggravating circumstance that "[t]he defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime." Jeffries, 110 Wn.2d at 339. It was this circumstance which the Court found raised "the spectre of a myriad of instructions and verdict forms whenever a criminal statute contains several instances of use of the word 'or'." Id. at 339. Here, the statute sets forth two different ways of committing a major economic offense, and thus provided alternative means. Cf., Smith, 159 Wn.2d at 784 ("As a general

rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed.”).

In contrast to Jeffries, a single instruction would have ensured jury unanimity on the question whether the crime involved (a) multiple incidents per victim or (b) multiple victims. Cf., Jeffries, 110 Wn.2d at 339. The failure to provide a unanimity instruction denied Dingman a unanimous verdict, as the State did not present substantial evidence to support both means for each count. The evidence was controverted as to some of the counts, was deemed insufficient as to other counts, and led to acquittals on still other counts.⁵ See Br. App. at 102-04. This Court should hold Dingman was denied a unanimous jury verdict on the major economic offense aggravating circumstance and remand for a new trial.

4. *CORIA* DOES NOT CONTROL WHETHER THE “MULTIPLE VICTIM” AGGRAVATING CIRCUMSTANCE MAY BE APPLIED TO A MARITAL COMMUNITY.

Dingman challenges the imposition of an exceptional sentence on counts 1, 7, 10, 12, 15, 18, 24, 26, 34, 37, 39, 42, 44, and 46, where the thefts in question concerned contracts with and property owned by a marital community. In response, citing State v. Coria, 146 Wn.2d 631, 48

⁵ The State does not reference these discrepancies in its response.

P.3d 980 (2002), the State claims the court could properly consider each married homeowner a separate victim. But Coria must be distinguished.

Coria involved a husband's prosecution for malicious mischief based on damage to community property. 146 Wn.2d at 634. On appeal he claimed he had not damaged "property of another" because he had an equal equitable stake in the property at issue. Id. at 636. In rejecting his claim, the Washington Supreme Court considered both the unambiguous meaning of "property of another" and the Legislature's intent in making malicious mischief a crime of domestic violence if committed by one family member against another. Id. As contrasted to the scenario presented here, there are significant policy differences prompting the Court's holding.

Save for Coria and State v. Goodman, 108 Wn. App. 355, 30 P.3d 516 (2001), also a domestic violence case, the State has not cited any cases in response to the common law authorities supplied by Dingman. See Br. App. at 105-08. Nor has the State cited any statutory authority for the proposition that when a crime happens to be committed against community property, the State may parse out the marital community into separate "victims" for purposes of seeking an enhanced sentence.

Had the State broken each count into separate charges for husband and wife, the charges would have violated double jeopardy prohibitions by

exceeding the unit of prosecution for theft. Cf., State v. Leyda, 157 Wn.2d 335, 345, 138 P.3d 610 (2006) (unit of prosecution for identity theft is the act of obtaining property, not each use of it); State v. Turner, 102 Wn. App. 202, 208, 6 P.3d 1226 (2000) (unit of prosecution for first-degree theft is act of exerting unauthorized control). Thus, in seeking an exceptional sentence for “multiple victims” based on a crime against property in which a marital community has equal, indivisible interests, the State is trying to obtain the multiple punishments which the double jeopardy clauses forbids. Womac, 160 Wn.2d at 650; U.S. Const. amend. 5; Const. art. I, § 9. This Court should strike the exceptional sentences in counts 1, 7, 10, 12, 15, 18, 24, 26, 34, 37, 39, 42, 44, and 46.

5. THE STATE’S STEADFAST REFUSAL TO PROVIDE THE DEFENSE WITH A COPY OF DINGMAN’S HARD DRIVE EXCEPT IN A FORMAT THAT THE DEFENSE EXPERT COULD NOT READ DEPRIVED DINGMAN OF MEANINGFUL ACCESS TO THE EVIDENCE, IN VIOLATION OF HIS RIGHT TO A DEFENSE.

Dingman challenges the State’s refusal to provide him with copies of his seized computers in a format readable by the defense expert as a violation of CrR 4.7 and his Sixth Amendment right to present a defense. Br. App. at 16-25. The State concedes that State v. Boyd, 160 Wn.2d 424, 158 P.3d 54 (2007), safeguards Dingman’s right to “meaningful access” to evidence supporting the criminal charges. The State claims, however, that

its provision of the hard drives in a format that all parties agreed Dingman's expert could not access, and could not buy the software to understand, complied with this requirement. Br. Resp. at 30-31. The State's claim is untenable.

Early in the proceedings, the State had notice that Dingman's expert required the hard drives in the form of a mirror image clone and did not have EnCase, the program used by law enforcement, or the money to purchase it. 2RP 18-21. Dingman believed the hard drives were necessary to present his defense. 2RP 16-17. EnCase cost \$3,607, and Dingman's public defender's office could not expend the funds to obtain the software. 4RP 151-52. In every case in which he had been retained until Dingman's case, the State had given Dingman's expert a mirror image of computer hard drives in a format he could read. 2RP 21. Dingman's expert was willing to do everything he could to facilitate the State's providing the hard drives, including supplying free hard drives for copying. 2RP 29.

In apparent defense of its refusal to provide the discovery, the State now points out that EnCase is a widely-used forensic tool. Br. Resp. at

23-29.⁶ But the issue is not whether EnCase is commonly used, but whether Dingman received meaningful access to necessary evidence. “The evident purpose of the disclosure requirement is to protect the defendant’s interests in getting meaningful access to evidence supporting the criminal charges in order to effectively prepare for trial and provide adequate representation.” Boyd, 160 Wn.2d at 432. Further, “the evidence must be disclosed ‘in time to permit ... beneficial use.’” Id. at 435 (quoting CrR 4.7(h)(4)). Dingman’s expert did not have EnCase and it was established that Dingman had already spent his available funds on this forensic expert and could not afford to retain another or buy him the software he required. 5RP 182-85. Thus, the State’s flippant characterization of its failure to provide the hard drives as Dingman’s fault because of his expert’s “philosophical dislike” of EnCase misses the mark. Br. Resp. at 31. Similarly, the State’s assertion that the hard drives might not be operational after sitting for a few years is not an excuse for failing to provide the materials. Id. The State did not try to comply with Dingman’s request and in fact ascertain that the drives were no longer operational. The State did not explore alternatives with Dingman, such as permitting Dingman’s expert to take temporary possession of the items to

⁶ Although the record does not support this contention, the State also implies Dingman should have known the State was using EnCase and so it is his own fault he retained an expert who did not have EnCase. Id.

make his own copies. Instead, the State dug in its heels and adamantly refused to provide the hard drives in any other format besides EnCase.

This denied Dingman the effective assistance of counsel.

“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s *playing a role that is critical to the ability of the adversarial system to produce just results*. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” Where the nature of the case is such that copies are necessary in order that defense counsel can fulfill this critical role, CrR 4.7(a) obliges the prosecutor to provide copies of the evidence as a necessary consequence of the right to effective representation and a fair trial.

Boyd, 160 Wn.2d at 435 (quoting Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)).

Dingman’s request for the hard drives in a language he could understand was a request for the meaningful access to which he was entitled both by CrR 4.7 and the Sixth Amendment. This Court should hold the denial of his discovery request denied him his right to a defense and the effective assistance of counsel, and was contrary to the State’s obligations under CrR 4.7, as stated in Boyd. The constitutional error requires reversal.

C. RESPONSE TO CROSS-APPEAL.

1. THIS COURT SHOULD DECLINE TO CONSIDER THE STATE'S CLAIMS WHERE THE STATE HAS FAILED TO ASSIGN ERROR AS REQUIRED BY RAP 10.3(a)(4).

RAP 10.3(a)(4) requires that an appellant include in the Brief of Appellant

A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignment of error.

RAP 10.3(a)(4).

If the issue is properly briefed such that the respondent can identify the nature of the arguments and research proper authority, appellate courts have discretion to decide whether non-compliance with the Rules of Appellate Procedure will warrant the court refusing to consider the claims on appeal. State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995). But “when an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), and fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue.” Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005); see also, State v. Korum, 157 Wn.2d 614, 623, 141 P.3d 13 (2006) (Supreme Court refuses to consider issue argued by State where State did not properly identify it in petition for review).

The State apparently believes itself aggrieved by the trial court's dismissal of several counts mid-trial and the court's refusal to order restitution to Four Seasons. With respect to the State's first claim, the sole authority provided by the State simply recites the standard of review for a sufficiency claim. The State does not address the question of whether counts dismissed after the State has rested may be resuscitated without offending double jeopardy. Further, other than remarking that the trial court relied on State v. Joy, 121 Wn.2d 333, 851 P.2d 654 (1993), and attempting to distinguish this case, the State fails to supply authority for its arguments. This Court should find the State has waived its argument on appeal by failing to assign error, identify the issue presented or provide legal authority for its claim. Cf., Ang v. Martin, (Court may refuse to entertain claims on appeal where a party has failed to provide legal citation to authority).

With respect to the State's complaint regarding the court's restitution order, although the State cites to legal authority, the nature of its argument is not clear. It is not evident whether the State believes the court was bound by defense counsel's stipulation regarding the amount of Four Seasons' loss, Br. Resp. at 71-72, or whether the State believes it presented sufficient evidence for restitution to be ordered. Br. Resp. at 80.

The pertinent argument header does not shed light on the question, as it simply reads,

Whether the trial court appropriately denied restitution for Four Seasons who had provided sunrooms for the Sharpes, Murphys, Ressler, Miller/Kuhns, and Gosnells.

Br. Resp. at 71.

An assignment of error and issue statement would have clarified the issues the State wished this Court to review, but these are missing. As a result Dingman must guess at the arguments the State is making in order to formulate a response. See Olson, 126 Wn.2d at 321 (where a party's failure to assign error or provide argument prejudices the other party, the Court may decline to consider the argument). For the State's failure to comply error under RAP 10.3(a)(4), this Court should refuse to consider the State's arguments.

2. EVEN ASSUMING THIS COURT CHOOSES TO REACH THE MERITS OF THE STATE'S CLAIMS, THE DISMISSAL OF CRIMINAL CHARGES FOR INSUFFICIENT EVIDENCE AFTER THE STATE HAS RESTED IS TANTAMOUNT TO A JUDGMENT OF ACQUITTAL, AND RESURRECTION OF THE CHARGES VIOLATES DOUBLE JEOPARDY.

The constitutional prohibitions against double jeopardy protect against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3)

multiple punishments for the same offense. Womac, 160 Wn.2d at 650-51; U.S. Const. amend. 5; Const. art I, § 9. In a jury trial, jeopardy attaches when a jury is empaneled and sworn. United States v. Martin Linen Supply Co., 430 U.S. 564, 569, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). Where a defendant successfully obtains dismissal of his initial prosecution for insufficient evidence at the close of the State's case, his retrial will violate the constitutional double jeopardy prohibition. Martin Linen Supply Co., 430 U.S. at 571, 575; State v. McReynolds, ___ Wn. App. ___, ___ P.3d ___, No. 24741-4-III, 2008 Wash. App. LEXIS 290 at 10 (Slip Op. February 5, 2008) (citing State v. Matuszewski, 30 Wn. App. 714, 717-18, 637 P.2d 994 (1981)). This is so even if the trial court's ruling was legally incorrect.

When a trial court dismisses a criminal case for insufficient evidence at the close of the State's case, no matter how erroneous that ruling may be, retrial of the defendant is precluded by the rule that one may not be twice placed in jeopardy for the same offense.

Matuszewski, 30 Wn. App. at 717-18 (emphasis added, citations omitted).

Here, Dingman moved to dismiss at the close of the State's case in chief on the basis that the State did not present sufficient evidence to establish the essential elements of the charged crimes beyond a reasonable doubt. 28RP 2639-40. After careful consideration of the motion, the court granted it with respect to counts 8, 13, 16, 21, 23, 24, 25, 27, 29, 31,

32, 40, 47, 50, and 56, and followed its oral ruling with a written order dismissing these counts with prejudice. 30RP 2955-82; CP 935-36. While Dingman believes the trial court correctly applied Joy in granting his motion to dismiss, this is beside the point. The State is barred from resurrecting the dismissed charges because the court's ruling was equivalent to a judgment of acquittal. Martin Linen Supply Co., 430 U.S. at 573-74; McReynolds, 2008 Wash. App. LEXIS 290 at 11. Thus, even assuming the State's failure to comply with RAP 10.3 does not bar review of its arguments, its arguments are without merit. This Court should affirm the dismissal order.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE STATE'S REQUEST FOR RESTITUTION TO FOUR SEASONS.

a. A restitution award is reviewable only for a manifest abuse of discretion. The authority of the trial court to order restitution is entirely statutory. State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). According to the SRA,

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 offense.

RCW 9.94A.753(3).

The State bears the burden of proving a restitution award by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). In determining restitution, the trial court must rely on no more than what is admitted by the plea agreement, or what is admitted, acknowledged, or proved at trial. State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 854 (1998). Evidence supporting restitution will be sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to speculation or conjecture. State v. Fleming, 75 Wn. App. 270, 274, 877 P.2d 243 (1994). “[I]mposition of restitution is generally within the discretion of the trial court and *will not be disturbed on appeal* absent an abuse of discretion.” State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999) (citations omitted, emphasis in original).

b. The trial court properly exercised its discretion in not ordering restitution to Four Seasons where the State did not meet its burden of proving the amount sought by a preponderance of the evidence.

The restitution hearing in this case occurred nearly a year after the conclusion of the criminal trial. At a hearing on January 4, 2007, the court chastised the State for being unprepared to proceed with an evidentiary

hearing regarding the amount of damages sought. 1/4/07RP 9-10.⁷ The court granted the State's request for a continuance of the hearing so additional evidence could be presented. 1/4/07RP 24-25.

At the subsequent hearing on January 18, 2007, the only additional evidence presented by the State was an affidavit from Four Seasons stating they wished the court to order restitution. The court ruled the State had not met its burden of proof:

Under RCW 9.94A.753 paragraph (5), the statute requires that the Court order restitution whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property. RCW 9.94A.753 paragraph (5) also allows the Court to not order restitution or reduce the restitution amount if extraordinary circumstances exist which make restitution inappropriate in the Court's judgment.

With regard to restitution, the State need not prove the amount of restitution with specific accuracy. However, the restitution award must be based on easily ascertainable damages. And the evidence must be sufficient to allow this Court to estimate the damages without having to engage in speculation or conjecture.

Here we have Four Seasons, which under the case law is clearly entitled to restitution. The unique facts here, however, [are] that Four Seasons already pursued Mr. Dingman civilly and has already reached a settlement in the amount of \$220,000 or \$223,000, based on the testimony of Anthony Russo from Four Seasons, who testified at the trial, not today. This settlement amount presumably covers work that Four Seasons did on contracts involving not only the victims who were involved in today's restitution hearing – that is, the Gosnells, Miller-Kuhns, the Murphys,

⁷ The State obtained transcription of three hearings pertaining to restitution. Those are referenced herein by date followed by page number.

the Ressler, and the Sharpes – but also persons not involved in this case or not part of today’ hearing. Specifically, those persons are Ansari, Beaulieu, Campbell, Connolly, Duran, Klemann, Paladijczuk, Rollolazo, Taylor, and Youtsey.

Mr. Russo further testified at trial that the wholesale cost of the rooms for the victims that are involved in today’s hearing were as follows: Gosnell, \$3,127; Miller-Kuhns, \$7,415.55, Murphy, \$8,090.56; Ressler, \$9,987.47; Sharpes, \$8,982.04.

As I’ve stated, Mr. Russo testified at the trial. During his trial testimony, Mr. Russo did not state whether the settlement amount of \$220,000 or \$223,000, whichever it was, with Mr. Dingman made Four Seasons whole as far as damages were concerned. Nor did Mr. Russo testify except as to the wholesale cost of the room what amounts Four Seasons expended on each of the victims involved in today’s hearing.

Today is the date of the restitution hearing. The State has been provided ample time to meet its burden to prove the amount of restitution by a preponderance of the evidence. No evidence has been provided to this Court to support the amounts being requested by the State. At best, this Court only has the trial testimony of Anthony Russo. But even with that, this court cannot estimate Four Seasons’ damages without engaging in speculation or conjecture as to whether Four Seasons was made whole by its settlement with Mr. Dingman in the civil matter and, if not, what amounts relating to the five particular victims at issue in this hearing, as opposed to the 15 persons, 15 parties, involved in the civil settlement, would be necessary to make Four Seasons whole.

Accordingly, this Court finds that the State has failed to meet its burden to prove by a preponderance of the evidence the amount of damages suffered by Four Seasons. There is simply no way, given the lack of evidence, that this Court can ascertain or estimate the amount of damages not covered by Four Seasons’ settlement with Mr. Dingman without engaging in speculation or conjecture.

1/18/07RP 10-12. The State filed a motion for reconsideration of the court's ruling, which the court denied. 2/16/07RP 4-5.

To prevail on appeal, the State must show the trial court manifestly abused its discretion. Enstone, 137 Wn.2d at 679. "An abuse of discretion occurs only when the decision or order of the court is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" Id. (citation omitted). The State has not shown an abuse of discretion.

The court referenced the correct statutory authority for a restitution award. 1/18/07RP 10. The court held the State to the proper burden of proof. Id. The court understood Four Seasons was entitled to receive restitution under RCW 9.94A.753. The court understood that the restitution amount had to be based on easily ascertainable damages and could not subject the court to speculation or conjecture. Id.

With these principles in mind, the court carefully evaluated the evidence presented by the State at trial and at the restitution hearing and determined the State did not meet its burden of proof. 1/18/07RP 10-12. In so ruling, the court acted well within its discretion. This Court should affirm the restitution order.

D. CONCLUSION.

As argued here and in Dingman's opening brief, this Court should reverse Dingman's convictions for theft in the first degree in counts 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, 46, and 49 for insufficient evidence. This Court should alternatively award Dingman a new trial based on State's discovery violation and the violation of his right to a unanimous jury verdict in counts 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, and 46. This Court should dismiss Dingman's convictions for money laundering based on a violation of the constitutional prohibition against double jeopardy. This Court should vacate the exceptional sentences and remand for imposition concurrent standard range sentences. Last, this Court should hold the State may not appeal the dismissal of counts for insufficient evidence after the State rested, and that the trial court did not abuse its discretion in denying the State's claim for restitution to Four Seasons.

DATED this 26th day of February, 2008.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant/Cross-Respondent

