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No. 36475-1-II

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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON
DEPT. OF

STATE OF WASHINGTON,

Respondent,

v.

MOISES ANGEL LARREINAGA,

Appellant/Defendant.

PIERCE COUNTY SUPERIOR COURT

CAUSE NO. 06-1-04150-1

THE HONORABLE LINDA CJ LEE,

Presiding at the Trial Court.

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by ordering restitution for an uncharged crime where the restitution was not agreed to by Mr. Larreinaga.

2. The trial court erred by ordering restitution because the State could not prove a causal connection between Mr. Larreinaga's offense of possessing a firearm and an unlawful death of another.

3. The trial court erred in ordering restitution because no evidence to support the restitution order is contained in the record.

4. The trial court abused its discretion in calculating Mr. Larreinaga's offender score when it failed to properly score his prior juvenile convictions.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the State is unable to charge a homicide crime because the defendant acted in self-defense can the court order restitution for the death of another in a sentence for unlawfully possessing a firearm absent agreement by the defendant? (Assignment

of Error Number One)

2. Is a restitution order improper where the beyond a reasonable doubt standard of proof, required for establishing the victim of crime, is circumvented by a non-jury determination that a victim exists? (Assignment of Error Number Two)

3. Where the Superior Court record contains no evidence to support a restitution order is such order improper? (Assignment of Error Number Three)

4. Where ten prior non-violent juvenile offenses are sentenced on five separate dates should the offender score be calculated as two and one half (2 ½) points absent evidence to the contrary? (Assignment of Error Number Four)

C. STATEMENT OF THE CASE

On September 5, 2006, 10, 2002, the defendant/appellant, Moises Angel Larreinaga, was charged by Information with one count of Unlawful Possession of a Firearm in the First Degree.¹ Mr.

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RCW 9.41.010 (12) and RCW 9.41.040 (1)(a).

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Larreinaga was prohibited from possessing a firearm because he was adjudicated guilty of Attempted Residential Burglary as a juvenile in 2004. CP2.

Mr. Larreinaga entered an Alford/Newton plea to the original charge on February 20, 2007.² CP 12-15. As a condition of the plea agreement the State agreed not to file any other charges “stemming from [the] same incident.” CP 12-15 at p. 2. Additionally, the Statement of Defendant on Plea of Guilty expressly provides that the State’s sentencing recommendation, including the State’s anticipated request for restitution, was not jointly made. CP 12-15 at p.2; RP I 23-25.

The trial court imposed sentence on the same date. The sentence included fifty-four (54) months in the Department of Corrections which represented the high end of Mr. Larreinaga’s presumptive range based on a perceived offender score of five (5). CP

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North Carolian v. Alford, 400 U.S. 25,91 S.Ct. 160,27 L.Ed.2d 162 (1970), State v. Newton, 87 Wn. 2d 363,552 P.2d 682 (1976).

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18-29. The question of restitution was scheduled to be decided by later court order. RP 1 27.

On June 1, 2007, a contested restitution hearing was held in which each side presented argument. No witnesses were called, however. Nor was any documentary evidence filed. The court ordered restitution in the sum of \$19,348.09. CP 46-47.

A timely Notice of Appeal was filed on June 29, 2007. CP 48-50.

A. ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ORDERING RESTITUTION.

Restitution imposed by the trial court is reviewed under the abuse of discretion standard. *State v. Dauenhauer*, 103 Wn.App. 373,377-78,12 P.3d 61 (2000), review denied, 143 Wn.2d 1011,21 P.3d 291,2001; *State v. Martinez*, 78 Wn.App. 870,899, P.2d 1302, rev.denied, 128 Wn.2d1017,911 P.2d 1342 (1995). Discretion is abused when it is exercised in a manifestly unreasonable manner or on untenable grounds. *State v. Enstone*, 137 Wn.2d 675,979-80,974 P.2d

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828 (1999); State v. ex rel Carrll v. Junker, 79 Wn.2d 12,26,482, P.2d 775 (1971). Additionally, application of an incorrect legal analysis or any error of law can also constitute an abuse of discretion. State v. Tobin, __ Wn. 2d __ , 166 P.3d 1167 (2007).

The Superior Court's power to order a defendant to pay restitution is purely statutory and governed by RCW 9.94A.753 (formerly RCW 9.94A.142).

Where contested, the State must prove restitution by a preponderance of the evidence. RCW 9.94A.530 (2) (Effective July 1, 2004); Hughes, 154 Wn. 2d at 154; State v. Dennis, 101 Wn.App. 223,226-27, 6P.3d 1173 (2000). Restitution is not a substitute for and does not deprive a victim of civil remedies. State v. Martinez, 78 Wn.App. 870,881,899 P.2d 1302 (1996), rev. denied, 128 Wn.2d 1017 (1996); RCW 9.94A.753(9)

a. The imposition of restitution for an uncharged crime was improper.

Absent an express agreement restitution cannot be based on injury or loss from uncharged crimes. Restitution must be based on

damages resulting solely from the precise crime charged. State v. Dauenhauer, *Id.* at 379-380. “A defendant may not be required to pay restitution beyond the crime charged or for other uncharged offenses absent a guilty plea with an express agreement as part of that process to pay restitution for crimes for which the defendant was not convicted.” Moreover, “restitution cannot be imposed based on a defendant’s ‘general scheme’ or acts ‘connected with’ the crime charged, when those acts are not part of the charge.” State v. Dauenhauer, 103 Wn.App. at 378; citing State v. Woods, 90 Wn.App. 904,907,953 P.2d 834, review denied, 136 Wn.2d 1021,969 P.2d 1064 (1998); State v. Miszak, 69 Wn.App.426,428,848 P.2d 1329 (1993).

In Mr. Larreinaga’s case, the State conceded that no crime other than unlawful possession of a firearm could be proved. “The shooting itself cannot be disproven to be self-defense.” CP 2. Furthermore, the State’s decision that it could not proceed with any type of homicide charge against Mr. Larreinaga was made by the State independent of, and prior to, the plea agreement by which Mr. Larreinaga plead guilty to the original charge of unlawfully possessing a firearm. RP 2 45.

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Mr. Larreinaga did not agree to pay restitution for any uncharged crime. The State was unable to charge any additional crime by its own concession. Moreover, the State agreed that it would not file any other charges “stemming from [the] same incident.” CP 12-15 at p. 2. Consequently, the State is bound by its plea agreement that Mr. Larreinaga be sentenced for the crime for which he was charged and convicted. The State’s request for restitution to cover expenses related to the death of another was improper and should have been denied.³

b. The State failed to prove a causal connection between the crime charged and damages to any victim.

The burden on the State in establishing restitution is not unreasonable. It requires that a causal connection be proved between the crime charged and a victim’s damages.

A trial court need only find that a victim’s injuries were causally connected to the defendant’s crime before ordering the

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Apparently the restitution sought by the State was for the medical and funeral expenses of the man who was shot by Mr. Larreinaga in self-defense, Mr. Norris-Romine. See CP 32-39. Because no documentation in support of the State’s request for restitution was filed, however, the record is not clear as to the precise nature of the restitution.

defendant to pay restitution for the resulting expenses of the victim.

State v. Kinneman, 122 Wn.App. 850,860,95 P.3d 1277 (2004), rev. granted, 154 Wn.2d 1001 (2005) (citing State v. Enstone, 137 Wn.2d 675,682,974 P.2d 828 (1999)).

The State must establish, “by a preponderance of the evidence a causal connection between the restitution requested and the crime with which the defendant is charged.” *Id.* (citing State v. Bunner, 86 Wn.App.158,160,936 P.2d 419 (1997)). A causal connection exists when, but for the offense, the loss or damages would not have occurred. State v. Hahn, 100 Wn. App. 391,399,996 P.2d 1125, rev. granted, 141 Wn.2d 1025 (2000); State v. Tobin, *Supra*.

Moreover, where restitution is ordered to compensate the victim of a crime, a victim must exist because “a restitution order must be based on the existence of a causal relationship between the crime charged and proven and the victim’s damages.” State v. Dauenhauer, *Supra* at 376.

Finally, the crime in question is limited to the crime charged and

proven at trial or by guilty plea under a beyond a reasonable doubt proof standard. State v. Hartwell, 38 Wash.App. 135,684 P.2d 778 (1984).

In the case at bar, Mr. Larreinaga was charged and convicted of what is commonly considered a victimless crime. Additionally, the State did not, and could not, prove there was a victim because the State could not prove beyond a reasonable doubt to a jury that the shooting was unlawful. Nonetheless, the State is attempting to circumvent the standard of proof intended to be applied to establishing the existence of a victim and a crime by seeking restitution for what was not an unlawful act, that is, the shooting by Mr. Larreinaga in self-defense.

The mere possession of a firearm does not cause the firearm to be used. The cause of the shooting here was that Mr. Norris-Romine caused Mr. Larreinaga to reasonably fear for his life, and Mr. Larreinaga consequently shot him in self-defense.

In conclusion, the State simply could not prove that there was a victim or an unlawful shooting here. Given that restitution is awarded to compensate a victim where a crime is committed against

that victim restitution is improper here. The trial court erred when it ordered restitution.

c. **The restitution order was improper because no evidence supporting restitution is contained in the record.**

Because restitution is considered part of an offender's sentence, restitution orders must comport with due process standards. *State v. Dennis*, 101 Wn.App. 223,229, 6 P.2d 1173 (2000) (restitution is part of sentence); *State v. Ford*, 137 Wn.2d 472,481,973 P.2d 452 (1999) (State's failure to present "some" evidence at sentencing does not meet minimum due process requirements); *State v. Raleigh*, 50 Wn.App. 248,748 P.2d 267 (1988) (State's failure to present evidence regarding damage or loss resulting from offense violates due process principles with respect to restitution).

In determining any sentence, including restitution, the sentencing court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.

Dedonado, 99 Wn.App. at 256. Thus, in light of statutory and constitutional considerations, where a defendant objects to restitution,

the State bears the burden of proving the amount of loss by a preponderance of the evidence. *Id.*; see also *State v. Ryan*, 78 Wn.App. 758,762,899 P.2d 825 (1995); *Dennis*, 101 Wn.App. at 226.

Here, restitution was contested. No witnesses were called, however, and no documentary evidence was filed by the State to establish restitution. While the record suggests that the trial court considered documents prepared by the State, no documentation supporting the restitution order was filed. As such, the source of the restitution amount is unclear. It was error for the trial court to order restitution based on the record below. The order violates Mr. Larreinaga's due process rights and must be reversed on this basis alone.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT CALCULATED MR. LARREINAGA'S OFFENDER SCORE.

Mr. Larreinaga's criminal history at the time of his sentencing included ten non-violent juvenile offenses for which he was sentenced on five separate dates. The following represents Mr. Larreinaga's

criminal history in its entirety: ⁴

<u>Crime</u>	<u>Date of Sentence</u>	<u>Date of Crime</u>	<u>Adult or Juvenile</u>	<u>Type of Crime</u>
Mal Misc 2	08-27-02	07-25-02	Juvenile	NV
Mal Misc 2	08-27-02	07-25-02	Juvenile	NV
Theft 2	08-27-02	07-25-02	Juvenile	NV
Theft 2	08-27-02	07-25-02	Juvenile	NV
Att Res Burg	07-15-03	04-30-03	Juvenile	NV
Aslt 3	07-15-03	05-06-03	Juvenile	NV
UPOF 2	07-15-03	05-06-03	Juvenile	NV
Att Res Burg	11-18-04	10-27-04	Juvenile	NV
UPCS	09-20-05	06-22-05	Juvenile	NV
UPCS	09-15-05	08-13-05	Juvenile	NV

Prior to imposing a criminal sentence the sentencing court must first calculate the correct standard range. Failure to do so is legal error which is subject to appellate review. *State v. Parker*, 132 Wash.2d 182,189,937 P.2d 575(1997). Calculation of an offender score is reviewed de novo. *State v. McCraw*,127 Wash.2d 281,289,898 P.2d 838(1995); *State v. McCorkle*, 88 Wash.App.485,945 P.2d 736(1997).

The Sentencing Reform Act of 1981 establishes presumptive

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The Judgment and Sentence does not list the County and State where each crime occurred which further inhibits an appellate court from properly reviewing his sentence.

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sentencing ranges for all felonies. RCW 9.94A.510. The ranges are based on the severity of the current offense and the defendant's offender score. RCW 9.94A.510(1); RCW 9.94A.515; RCW 9.94A.520; RCW 9.94A.525. The process for determining a defendant's offender score is set forth under RCW 9.94A.525, and involves assessing prior and other current offenses under a number of different categories, including the type, class, and date of the offense.

In addition, the statute provides:

(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or information;...

RCW 9.94A.525(5).

The language of the statute is mandatory. State v. Wright, 76 Wn.App. 811,829,888 P.2d 1214, review denied, 127 Wn.2d 1010(1995). The language creates two classes of prior offenses for purposes of conducting the same criminal conduct analysis: (a) prior offenses that have previously been found to constitute the same criminal conduct, and (b) those that have not.

Under the first class of prior offenses, the statute provides that if a prior trial court has determined that two or more convictions constitute the same criminal conduct, the current trial court is bound by that determination. See Wright, 76 Wn.App. at 828-29; State v. Perry, 110 Wash. App. 554,42 P.3d 436(2002).

Under the second class of prior offenses, however, when prior adult offenses were served concurrently, or prior juvenile offenses were served consecutively, the statute requires that the current trial court independently determine whether they constitute the same criminal conduct, or whether to count them as separate offenses. State v. McCraw, 127 Wn.2d 281,287,898 P.2d 838(1995); State v.

Reinhart, 77 Wn.App.454,459,892 P.2d 110, review denied, 127 Wn.2d 1014(1995). Moreover, only if the prior offenses are from “separate counties or jurisdictions,” arise from “separate complaints, indictments, or information,” or the “sentences [were] imposed on separate dates,” may the current sentencing court presume that prior offenses do not constitute the same criminal conduct. RCW 9.94A.525(5)(a)(i).

For purposes of what constitutes prior criminal convictions, the state bears the burden of proving criminal history by a preponderance of the evidence. RCW 9.94A.500 (former 9.94A.110); State v. Ammons, 105 Wash.2d 175,186, 718 P.2d 796(1986). The best evidence concerning a prior conviction is a certified copy of the Judgment. State v. Cabrera, 73 Wash.App.165,868 P.2d 179(1994). Furthermore, in accordance with basic principles of due process “the facts relied upon by the trial court must have some basis in the record.” State v. Ford, 137 Wash.2d 472,477,973 P.2d 452(1989), citing State v. Bresolin, 13 Wn.App.386,396,534 P.2d 1394(1975).

In Mr. Larreinaga’s case, the State failed to meet its burden of

production when it did not provide the prior sentencing courts' rulings that Mr. Larreinaga's prior juvenile offenses were not the same criminal conduct. The trial court here *was prohibited from presuming* that offenses committed and/or sentenced on the same date constituted separate offenses for sentencing purposes. Without such proof, even assuming the existence of the convictions, all juvenile offenses committed and/or sentenced on the same date should have been counted together rather than as separate offenses.

Proper calculation of Mr. Larreinaga's prior juvenile offenses, therefore, should have led to a finding of one-half($\frac{1}{2}$) point each for the juvenile offenses sentenced on 08-27-02, 07-15-03, 11-18-04, 09-20-05, and 09-15-05, for a total of two and one half ($2 \frac{1}{2}$) points. Because "[t]he offender score is the sum of points accrued under this section rounded down to the nearest whole number" pursuant to RCW 9.94A.525, Mr. Larreinaga's prior conviction score should actually have been calculated as two (2) points. Combined with the one point for current offenses his score would, thus, yield a presumptive range of thirty-one to forty-one (31-41) months.

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Mr. Larreinaga was incorrectly assigned a point value of five (5) for his offender score which yields a standard range of forty-one to fifty-four (41-54) months. Mr. Larreinaga's remedy is to remand for resentencing with a corrected prior conviction score.

E. CONCLUSION

For all of the foregoing reasons and conclusions Mr. Larreinaga respectfully requests that this Court remand his case for resentencing, and further that this court vacate the trial court's restitution order.

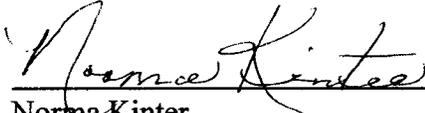
RESPECTFULLY SUBMITTED this 10th day of December,
2007.



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CERTIFICATE OF SERVICE

The undersigned certifies that on December 10, 2007, she delivered in person a copy of this Opening Brief to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and delivered by U.S. mail to appellant, Moises A. Larreinaga, DOC # 303578, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washington 99362, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on December 10, 2007.



Norma Kinter