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COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON, RESPONDENT

v.

MOISES ANGEL LARREINAGA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 06-1-04150-1

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KAREN WATSON
Deputy Prosecuting Attorney
WSB # 24259

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court properly order restitution when, but for defendant's unlawful possession of a firearm, Norris-Romine would not have been shot and killed? Was the parties' stipulation to the amount of restitution a reasonable basis for the court to ascertain damages without subjecting the trier of fact to mere speculation or conjecture?

2. Did the court properly calculate defendant's offender score when defendant's prior offenses were not the 'same criminal conduct' as required by RCW 9.94A.525(5)(a)(i)?

B. STATEMENT OF THE CASE.

1. Procedure

On September 5, 2006, the State charged Moises Angel Larreinaga, hereinafter "defendant," with one count of first degree unlawful possession of a firearm. CP 1. Defendant pled guilty as charged on February 20, 2007. CP 12-15; RP 4-11. As part of the plea agreement, the State agreed not to file any additional charges from that incident. CP 12-15. Defendant was sentenced to 54 months based upon an offender score of five. CP 18-29; RP 6, 25. Defendant stipulated to his offender score prior to sentencing. CP 16-17. A contested restitution hearing was

held on June 1, 2007. CP 46-47; RP 31-48. The court ordered defendant to pay \$19,348.09 in restitution. CP 46-47; RP 48.

Defendant filed a timely notice to appeal. CP 48-50.

2. Facts

On August 7, 2006, defendant shot and killed Jeffrey Norris-Romine. CP 2. Both defendant and Norris-Romine were armed. CP 2. At the time of the shooting, defendant was prohibited from possessing a firearm because he was adjudicated guilty as a juvenile of attempted residential burglary in 2004. CP 2, 16-17. Because both defendant and Norris-Romine were armed, the State could not disprove self-defense. CP 2. As a result, the State charged defendant with first degree unlawful possession of a firearm. CP 2.

C. ARGUMENT.

1. THE COURT PROPERLY ORDERED DEFENDANT TO PAY \$19, 348.09 IN RESTITUTION BECAUSE, 'BUT FOR' DEFENDANT'S UNLAWFUL POSSESSION OF A FIREARM, DEFENDANT WOULD NOT HAVE SHOT AND KILLED NORRIS-ROMINE.

A restitution award will not be disturbed absent an abuse of discretion. *State v. Keigan*, 120 Wn. App. 604, 609, 86 P.3d 798 (2004). An abuse of discretion occurs when the action of the court is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.*

Restitution is appropriate when there is a causal connection between the underlying facts of the crime charged and the damages to the victim. See *State v. Coe*, 86 Wn. App. 841, 939 P.2d 715 (1997). In determining whether there is a causal connection between the damages and the charged crime, the court employs a ‘but for’ analysis. *State v. Dedonado*, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000). *State v. Enstone*, 89 Wn. App. 882, 886, 951 P.2d 309 (1998) (citing *State v. Hunotte*, 69 Wn. App. 670, 676, 851 P.2d 694 (1993)), aff’d, 137 Wn.2d 675, 974 P.2d 828 (1999). “A causal connection exists when, ‘but for’ the offense committed, the loss or damages would not have occurred.” *Id.* There is no requirement that a victim’s damages be foreseeable in order to support a restitution order. Restitution shall be ordered “whenever the offender is convicted of an offense which results in injury to any person.” *State v. Enstone*, 137 Wn.2d 675, 680, 974 P.2d 828 (1999).

Restitution “. . . shall be based on easily ascertainable damages for injury to or loss of property . . . (.)” RCW 9.94A.753(3). The amount of restitution shall not exceed double the amount of the offender’s gain or the victim’s loss from commission of the crime.”

The language of the restitution statute was meant to give the trial court broad powers of restitution. *State v. Fleming*, 75 Wn. App. 270, 274, 877 P.2d 243 (1994), citing, *State v. Davidson*, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991). Restitution need not be established with specific

accuracy. *Id.*, citations omitted. Instead, “[e]vidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.” *Fleming*, 75 Wn. App. at 275, citing *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992)(quoting *State v. Mark*, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984)). The amount of damages claimed must be supported by substantial credible evidence. *Pollard*, 66 Wn. App. at 785.

In *State v. Coe*, 86 Wn. App. 841, Coe was convicted of unlawful manufacture of a controlled substance. Coe rented a house with a detached garage from Roger Teeter. *Id.* at 715. Coe used the garage and the mother-in-law apartment above it, for his marijuana grow operation. *Id.* Coe created a grow room in the garage. *Id.* Coe sealed the grow room and vented the grow operation’s warm, moist air into the mother-in-law apartment above, which caused substantial moisture damage, including mold, mildew, and severe dry rot. *Id.* at 715-16. At sentencing, the court ordered Coe to pay \$38,322 to Teeter in restitution for the damages caused by the grow operation. *Id.* at 716.

On appeal, Coe challenged the restitution order by claiming there was no causal connection between unlawful manufacturing of a controlled substance and the damages to Teeter’s home. *Id.* at 716. He claimed that growing marijuana is a victimless crime. *Id.* In affirming the sentencing

court's restitution order, the court found that, but for Coe's marijuana grow operation, the damage to Teeter's house would not have occurred. *Id.*

Similarly, in *State v. Harrington*, 56 Wn. App. 176, 782 P.2d 1101 (1989). Harrington was convicted of unlawful possession of stolen property. *Id.* at 178. The stolen property, a vehicle, sustained damage while in Harrington's possession. *Id.* The court ordered Harrington to pay for the damages to the vehicle. *Id.* On appeal, Harrington argued that the court erred in ordering him to pay restitution because he pled guilty to a possessory crime, which in and of itself could not be the cause of the damage to the victim's car. *Id.* Harrington further argued that the damage to the victim's car "was the sole result of acts which constitute other uncharged crimes such as malicious mischief or negligent driving." *Id.*

The court affirmed the restitution order because (1) Harrington admitted illegally possessing the vehicle the whole time it was gone from the owner; (2) it was undisputed that the damage to the vehicle occurred during that time; and (3) the damage to the car was a foreseeable result of Harrington's illegal possession. *Id.* at 180. The court noted that "the fact that the damage was the immediate result of specific acts which might constitute an "uncharged crime" cannot be used to legally excuse Harrington." *Id.*

In the present case, the State presented the court with evidence that the defendant was unlawfully in possession of a firearm when he shot and

killed Norris-Romine. Like *Coe* and *Harrington*, but for defendant's illegal act, Norris-Romine would not have been killed. The court properly found a causal connection between the defendant's criminal act, first degree unlawful possession of a firearm, and the damages incurred when defendant used that gun to shoot and kill Norris-Romine.

Defendant asserts that there is no evidence in the record to support the restitution order. Brief of Appellant at 10. However, the defendant stipulated to the amount of restitution at the June 1, 2007, restitution hearing. RP 48.

Prosecutor: Well, your Honor, if [defense counsel] will agree to the amount... What the order that the State is requesting is \$19,348.09. And I believe we provided the support for that to [defense counsel] previously.

Defense Counsel: I have reviewed that. And if [the court is] okay to go forward we could probably wrap this matter up today.

Court: That's fine. I didn't know whether the amount was being disputed as well.

Prosecutor: I don't think so.

Defense Counsel: There's minor dollars. It's not even worth arguing about.

RP 47-48.

Defendant's sole challenge to the restitution order at the trial court level was whether there was a causal connection between defendant's crime and the damages. As noted above, defendant stipulated to

\$19,348.09 in damages. Defendant's stipulation was a reasonable basis on which the court could ascertain damages without resorting to mere speculation or conjecture. The restitution order should be affirmed.

2. THE SENTENCING COURT PROPERLY
CALCULATED DEFENDANT'S OFFENDER SCORE
BECAUSE DEFENDANT'S PRIOR OFFENSES DID
NOT CONSTITUTE THE SAME CRIMINAL CONDUCT
AS REQUIRED BY RCW 9.94A.525.

The trial court calculates an offender score by adding together the current offenses and prior convictions. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). If the court finds that some of the prior offenses encompass the same criminal conduct, then those offenses count as only one crime. RCW 9.94A.525(5)(a)(i); see *State v. Bolar*, 129 Wn.2d 361, 917 P.2d 125 (1996)(J. Talmadge concurring). To constitute the "same criminal conduct," the separate crimes must involve: (1) the same criminal intent; (2) the same time and place; and (3) the same victim. RCW 9.94A.589(1)(a). "Same criminal conduct is not established unless all three elements are present. *State v. Vake*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The phrase "same criminal conduct is narrowly construed to disallow most assertions of same criminal conduct. *State v. Flake*, 76 Wn. App 174, 181, 883 P.2d 341 (1994); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

In the present case, defendant claims that his offender score was incorrectly calculated. However, defendant waived his right to appeal on this issue when he stipulated to his offender score at sentencing. CP 6; RP 48.

In *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000), defendant pled guilty to charges of first degree burglary and first degree assault arising from a violent assault on defendant's former girlfriend. *Nitsch*, 100 Wn. App. at 513. At sentencing, both parties represented to the court that the defendant's offender score was two, arrived at by counting each offense as an 'other current offense.' *Id.* at 518. For the first time on appeal, defendant argued that his offender score was miscalculated because his two crimes encompassed the same criminal conduct and should have counted as one crime under former RCW 9.94A.400(1)(a).

The court rejected the defendant's argument not only because he failed to raise it in the proceedings below, but also because he affirmatively agreed to his standard range and offender score prior to entering the plea. *Nitsch*, at 522. The court held that a defendant waives any argument regarding same criminal conduct when he stipulates that his offender score is properly calculated. *Id.* at 519; see also *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618, 625 (2002)(holding that a defendant can waive a challenge to a miscalculated offender score

where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion).

In this case, the record is clear that defendant did not raise the ‘same criminal conduct’ issue at the sentencing proceedings below. RP 3-27. It is apparent from the record that defendant affirmatively agreed to his standard range and offender score when he signed the stipulation on prior record and offender score and the judgment and sentence. CP 16-17, 18-29. Both documents specify that defendant’s offender score is five. This places the defendant squarely within the *Nitsch* holding. Based on *Nitsch*, defendant is not entitled to raise this issue for the first time in this appeal.

Even if the court reaches the ‘same criminal conduct’ issue, defendant’s argument fails because his prior offenses cannot satisfy all three elements of the ‘same criminal conduct’ test as required by RCW 9.94A.525(5)(a)(i). Defendant stipulated to the following

CRIME	DATE OF SENTENCE	DATE OF CRIME	ADULT/ JUVENILE	TYPE OF CRIME	POINT
Mal Misc 2	8-27-02	7-25-02	Juvenile	NV	.5
Mal Misc 2	8-27-02	7-25-02	Juvenile	NV	.5
Theft 2	8-27-02	7-25-02	Juvenile	NV	.5
Theft 2	8-27-02	7-25-02	Juvenile	NV	.5
Att. Res	7-15-03	4-30-03	Juvenile	NV	.5

Burg					
Aslt 3	7-15-03	5-6-03	Juvenile	NV	.5
UPOF 2	7-15-03	5-6-03	Juvenile	NV	.5
Att Res Burg	11-18-04	10-27-04	Juvenile	NV	.5
UPCS	9-20-05	6-22-05	Juvenile	NV	.5
UPCS	9-15-05	8-13-05	Juvenile	NV	.5

Defendant argues that all his prior offenses that were committed and/or sentenced on the same date should be counted together, rather than as separate offenses, unless the State produces a copy of the prior offenses' judgment and sentence. Brief of Appellant at 16. This, however, ignores the 'same criminal conduct' analysis that is required by RCW 9.94A.525(5)(a)(i).

RCW 9.94A.525(5)(a) governs the scoring of prior convictions.

The statute provides, in pertinent part:

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 9.94A.589(1)(a)¹, 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 informations ...

RCW 9.94A.525(5)(a).

Defendant argues that his August 27, 2002, convictions for two counts of second degree malicious mischief, and two counts of second degree theft should be counted as one offense on his offender score, which would result in .5 point. He also argues that his July 15, 2003, convictions for attempted residential burglary, third degree assault, and second degree unlawful possession of a firearm should be counted as one offense on his offender score, which would also result in .5 point. Defendant concedes that this November 18, 2004, conviction for attempted residential burglary and his September 20, 2005, and September 15, 2005, convictions for unlawful possession of a controlled substance should each be counted as separate offenses on his offender score, which results in 1.5 points. Together, these five offenses would give defendant an offender score of 2.5. Defendant’s argument fails because he has failed to engage in the ‘same criminal conduct’ analysis as required by RCW 9.94A.525(5)(a)(i).

¹ RCW 9.94A.589(1)(a) provides in the relevant part:
“Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

As discussed above, crimes do not constitute the “same criminal conduct” for purposes of RCW 9.94A.589 if the crimes involved a different criminal intent. RCW 9.94A.589(1)(a). In determining whether multiple crimes involved the same objective criminal intent, such that they may be treated as ‘same criminal conduct’ at sentencing, the relevant inquiry is to what extent did the criminal intent, when viewed objectively, change from one crime to the next. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999).

Clearly, the intent elements for attempted residential burglary, third degree assault, and second degree unlawful possession of a firearm, are not the same. Under these circumstances, a trial court does not abuse its discretion by refusing to consider the three crimes as one offense for purposes of calculating the offender score.

Similarly, for the August 27, 2002, convictions, the intent element for second degree malicious mischief is different than the intent element for second degree theft. As noted above, without the same intent elements, the crimes cannot constitute the ‘same criminal conduct.’

In addition to having different intents, defendant’s 2003 convictions for attempted residential burglary, third degree assault, and second degree unlawful possession of a firearm were not all committed on the same date. The attempted residential burglary was committed on April 30, 2003, whereas the third degree assault and second degree unlawful

possession of a firearm were committed on May 6, 2003. Thus, in addition to having different intents, these three crimes were not committed on the same date, and therefore cannot constitute the 'same criminal conduct.' See concurring opinion in *State v. Bolar*, 129 Wn.2d 361.

The court properly counted each of defendant's prior offenses separately. Because defendant's offender score was properly calculated, this court should affirm defendant's sentence.

D. CONCLUSION.

For the reasons stated above, this court should affirm defendant's sentence and restitution order.

DATED: April 14, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

Karen Watson
KAREN A. WATSON
Deputy Prosecuting Attorney
WSB # 24259

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

4/14/08 [Signature]
Date Signature

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