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DIVISION II

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No. 37301-7-II

STATE OF WASHINGTON
BY JW

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LARRY P. GUIDRY, JR.,

Appellant.

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

The Honorable Christine A. Pomeroy, Judge
Cause No. 07-1-01538-1

BRIEF OF RESPONDENT

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PM 1/16/09

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion in holding that Guidry was not lawfully fishing under the Nisqually Tribal Code, when the federal courts and the Nisqually tribal fishing regulation do not allow a non-member to exercise treaty rights as a proxy for a tribal member, and the Nisqually regulation is consistent with state law.

2. Whether this Court should affirm Guidry's convictions, when he failed to timely object to the sufficiency of the evidence for any of the 11 counts.

3. Whether Guidry's argument about the sufficiency of the evidence should fail, even if he had timely raised the argument, when the evidence overwhelmingly supports his convictions.

4. Whether the trial court abused its discretion in finding Guidry guilty beyond a reasonable doubt of all 11 counts against him, when none of the counts violated the constitutional prohibition against double jeopardy.

5. Whether the State can regulate treaty fishing inside a tribe's reservation, in its usual and accustomed fishing areas, and outside its reservation if the regulation is non-discriminatory and necessary for conservation, even though enforcement of RCW 77.15.570 against Guidry is not a regulation of treaty fishing.

6. Whether the trial court abused its discretion in imposing restitution of \$10,000, when there was sufficient proof that the amount was causally connected to Guidry's convictions.

B. STATEMENT OF THE CASE.

1. Facts.

The State accepts Guidry's statement of the case, including the procedural facts and the substantive facts, as true.

C. STANDARD OF REVIEW

The applicable standard of review for this case is Abuse of Discretion. A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.* A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view that "no reasonable person would take," and arrives at a decision "outside the range of acceptable choices." *Id.*

D. ARGUMENT.

1. The trial court did not abuse its discretion in holding that Guidry was not lawfully fishing under the Nisqually Tribal Code.

a. Guidry cannot lawfully exercise his wife's treaty fishing rights on her behalf, because the federal courts and the Nisqually Tribal Code do not allow a non-member to exercise treaty rights as a proxy for a tribal member.

Guidry's wife, Lorena Guidry, is a member of the Nisqually Tribe. [RP 161-62, 178] The Nisqually Tribe is a signatory to the Medicine Creek Treaty. *United States v. Washington*, 384 F. Supp.

312, 367-69 (W.D. Wash. 1974) ("Boldt decision"), *aff'd*, 520 F.2d 676 (9th Cir. 1975). However, her tribe's status as a treaty tribe does not give her the authority to delegate her treaty fishing rights to Guidry, a non-member. In *United States v. Washington*, 476 F. Supp. 1101, (W.D. Wash. 1981), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143, 71 L. Ed. 2d 294, 102 S. Ct. 1001 (1982), intervenor tribal entities believed they had fishing rights under the Medicine Creek and Point Elliot treaties because their ancestors were members of previously existing tribes that were parties to the treaties. The court held that:

The fishing rights secured by the treaties of Medicine Creek and Point Elliot are communal rights which belong to the Indians with whom the treaties were made in their collective sovereign capacity. Being communal in nature these rights are not inheritable or assignable by the individual member to any person, party, or other entity of any kind whatsoever. *Id.* at 1110.

Similarly, in *Cree v. Waterbury*, 873 F. Supp. 404 (E.D. Wash. 1994), *rev'd on other grounds*, 78 F3d 1400 (9th Cir. 1996), plaintiff Douglas Beebe was an enrolled member of the Makah Tribe. He drove logging trucks to haul tribal timber from the Yakama Reservation to off-reservation buyers. He believed that the Yakama's treaty right to haul tribal timber over state highways

without having to pay licensing and permit fees extended to him as their employee. *Id.* at 407. The court held that Yakama's treaty rights cannot vest in a non-member agent or employee. "Beebe's attempt to exercise Treaty rights as a proxy clearly contradicts the law regarding the nature of such rights." *Id.* at 428-29.

The Nisqually Tribal Code requires that a tribal member take part in a tribal fishery if he or she is assisted in the fishery by a non-tribal spouse. The code states that within the Nisqually Reservation and the Tribe's off-reservation usual and accustomed fishing places,

An enrolled member may secure the assistance of his or her spouse. Such spouse may fish for the enrolled member without the enrolled member present on the boat. Nisqually Tribal Code, §§ 14.20.01(c)(i) and (d)(i)(A).

The Tribe's regulation does not permit the enrolled member's absence for any part of the fishing process except being on the boat.

In Guidry's case, the State observed him participating in the Nisqually treaty tribal fishery on December 18-21, 2005. [RP 71, 75, 91, 92, 104, 108, 111-112, 114] On December 18-19, 2005, his wife, Lorena, was away from the reservation. [RP 204] On December 20-21, 2005, Lorena was neither on the boat with Guidry

or at the Riverbend Campground where he unloaded and sorted the fish he caught. [RP 178-79] Guidry was exercising the Nisqually Tribe's treaty rights as a proxy for his wife, in contravention of federal law and the Nisqually Tribal Code. [RP 265; FF 11; CL 3] The trial court did not abuse its discretion in finding that Guidry was not lawfully fishing under the Nisqually Tribal Code.

b. The Nisqually tribal fishing regulation is consistent with state law.

The Nisqually Tribal Code does not conflict with State law. The State's statute, RCW 77.15.570, makes it unlawful ". . .for a person who is not a treaty fisherman to participate in taking fish or shellfish in a treaty Indian fishery, or to be aboard a vessel, or associated equipment, operating in a treaty Indian fishery." However, like the Nisqually Tribal Code, the statute allows for conditional spousal assistance. RCW 77.15.570(3)(a), provides:

The spouse, forebears, siblings, children, and grandchildren of a treaty Indian fisherman may assist the fisherman in exercising treaty Indian fishing rights when the treaty Indian fisherman is present at the fishing site.

This concept of "assist" in the State's statute does not conflict with the meaning of "assistance" in Nisqually Tribal Code. In *State v. Price*, 87 Wn. App. 424, 431, 942 P.2d 377 (1997), the court said that to assist in fishing, "the person assisted or assisting

must be present at the catch.” *Id.* at 431. Such assistance can include helping to unload the boat, sorting the fish from the boat, and gutting the fish. Guidry can fish alone in his boat, as the Nisqually regulation allows, without violating RCW 77.15.570 if Lorena is “present at the fishing site,” sorting or cleaning fish on the shore.

Guidry argues that his wife’s presence at the site is unnecessary. He cites the rule of lenity as a reason for interpreting “assist” within RCW 77.15.570 to mean “permission and spousal support.” [Brief of Appellant 17-18] Guidry says a wife “assists” her husband by taking care of the home while he works every day. [Brief of Appellant 18] This interpretation of “assist” strains credulity and logic. Washington courts avoid construing statutes in a manner that results in “unlikely, absurd, or strained consequences.” *State v. Squally*, 132 Wn.2d 333, 344, 937 P.2d 1069 (1997). In Guidry’s case, the trial court properly rejected Guidry’s interpretation. [RP 265; CL 4]

The Nisqually Tribal Code is consistent with the State’s statute. It permits Lorena Guidry to have her husband handle the fishing net on the boat while she performs other tasks associated with taking fish. In the present case, however, she did not assist

him in any way. [RP 265; FF 11; CL 3] The trial court did not abuse its discretion in holding that Lorena Guidry must be assisting her husband to comply with the Nisqually Tribal Code and RCW 77.15.570. [RP 264-65; FF 11; CL 4]

2. Guidry did not timely object to the sufficiency of the evidence for any of the 11 counts, so this court should affirm his convictions.

In a criminal case, evidence is sufficient to support a finding of guilt “if, when viewed in the light most favorable to the State, any rational trier of fact could find each element of the crime proved beyond a reasonable doubt.” *State v. DeVries*, 149 Wn.2d. 842, 849, 72 P.3d 748 (2003). When a defendant challenges the sufficiency of evidence in a criminal case, a reviewing court will “draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant.” *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

A defendant’s claim of insufficiency “admits the truth of the State’s evidence and all reasonable inferences that can be drawn from it.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Courts give direct and circumstantial evidence equal weight. *State v. Linden*, 138 Wn. App. 110, 117, 156 P.3d 259 (2007). Courts “leave resolution of conflicting testimony, credibility

determinations, and the persuasiveness of evidence to the fact finder and do not review them on appeal." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Guidry did not object at trial to the sufficiency of the evidence or move for a directed verdict based on the lack of evidence for any of the 11 counts against him. He did not properly preserve this issue for appeal. The Washington State Court Rules of Appellate Procedure, 2.5(a), state:

(a) **Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court. Wash. R. App. P. 2.5(a).

Guidry's arguments do not allege lack of jurisdiction, a failure to establish facts or a claim upon which relief can be granted, or manifest error affecting a constitutional right. Accordingly, this Court should refuse to review Guidry's arguments regarding the sufficiency of the evidence, and affirm his convictions.

3. Even if Guidry had timely raised the sufficiency-of-the-evidence argument in the trial court, this argument should fail because the evidence overwhelmingly supports the convictions.

a. The evidence in the record is sufficient to support Guidry's convictions for Counts 1 and 2, even though the trial court's Findings of Fact 3 includes an element not testified to by one officer.

The elements of Count 1, Engaging in Fish Dealing Activity -

- Unlicensed, First Degree—RCW 77.15.620(3), are:

On or about the 11th day of January, 2005, in the County of Thurston, State of Washington, the above-named Defendant engaged in the wholesale selling, buying, or brokering of food fish or shellfish and did not hold a wholesale dealer's or buying license required by RCW 77.65.280(2) or 77.65.480 for anadromous game fish; and/or landed and sold his catch or harvest in the state to anyone other than a licensed wholesale dealer within or outside the state and did not hold a direct retail endorsement required by RCW 77.65.510; and the violation involved fish or shellfish worth two hundred fifty dollars or more.

The elements of Count 2, Unlawful Trafficking in Fish,

Shellfish, or Wildlife, First Degree—RCW 77.15.260(2), are:

On or about the 11th day of January, 2005, in the County of Thurston, State of Washington, the above-named Defendant trafficked in fish, shellfish, or wildlife with a value of two hundred fifty dollars or more, and the fish or wildlife is classified as game, food fish, shellfish, game fish, or protected wildlife and the trafficking is not authorized by statute or rule of the department.

In contesting the sufficiency of the evidence to support guilty verdicts on Counts 1 and 2, Guidry assigns error to the trial court's

Finding of Fact 3 and Conclusion of Law 8. Finding of Fact 3 reads:

On Counts 1 and 2, which took place on January 11, 2005, Washington Department of Fish and Wildlife (WDFW) Officer Carl Klein testified, and the defendant acknowledged, that the defendant had a sign by the roadside that advertised "Chum salmon for sale." Officer Klein testified that the defendant was selling a commercial quantity of salmon. The defendant did not have a wholesale dealer's license or a direct retail endorsement required for selling the salmon. [FF 3]

Conclusion of Law 8 reads:

The Defendant is Guilty beyond a reasonable doubt of the offenses of:

1. ENGAGING IN FISH DEALING ACTIVITY – UNLICENSED, FIRST DEGREE, RCW 77.15.620(3), committed on January 11, 2005.
2. UNLAWFUL TRAFFICKING IN FISH, SHELLFISH, OR WILDLIFE, FIRST DEGREE, RCW 77.15.260(2), committed on January 11, 2005.
- 3-6. PARTICIPATION OF NON-INDIAN IN INDIAN FISHERY FOR COMMERCIAL PURPOSE, X4, RCW 77.15.570(2), committed on December 18 through 21, 2005.
- 7-10. COMMERCIAL FISHING WITHOUT A LICENSE, FIRST DEGREE, X4, RCW 77.15.500(2), committed on December 18 through 21, 2005.
11. OBSTRUCTING A LAW ENFORCEMENT OFFICER (ON OR AFTER MAY 14, 2001), RCW 9A.76.020(1), committed on December 21, 2005. [CL 8]

The record supports the trial court's Finding of Fact 3. On January 11, 2005, WDFW Officer Carl Klein was on patrol in Thurston County. He was on the Yelm Highway approximately one-

quarter mile past a sign stating "Now Leaving Nisqually Indian Reservation." [RP 53] He saw several signs on the roadside advertising fresh salmon for sale. He contacted Guidry and another individual standing by two vehicles parked next to Yelm Highway. [RP 52-53] They asked Officer Klein if he wanted to purchase salmon. He declined and asked to see if they had the licenses required by the state to be selling salmon. [RP 54] Guidry handed Officer Klein a spousal Medicine Creek Treaty card. [RP 54] Officer Klein asked Guidry if he had a wholesale dealer's card. Guidry said he did not. [RP 54-55]

Officer Klein contacted the WDFW Commercial Licensing Division to find out whether Guidry had a Washington wholesale license or commercial license. He did not. [RP 55] According to an affidavit by WDFW's Commercial Licensing Division on January 4, 2008, Guidry never was licensed with the division for any type of commercial fishing activity, and he never held a Washington commercial fishing license or permit. [RP 56-57] Officer Klein testified that a person needs a wholesale dealer's license to sell salmon on the roadside if the person does not have a commercial fishing license. [RP 57-58] Guidry had neither a wholesale dealer's license nor a direct retail endorsement. [RP 77]

The one element required for Counts 1 and 2 that the trial court included in Finding of Fact 3, but that was not included in WDFW Officer Klein's testimony, is that the violations for Counts 1 and 2 involved fish or shellfish worth two hundred fifty dollars or more. However, the State's original, first amended, and second amended information, and its certification of probable cause, indicated Guidry was selling a commercial quantity of salmon for Counts 1 and 2. This put Guidry on notice of the State's allegation that he was selling and trafficking a commercial quantity of fish.

In addition, Guidry testified that in 2005, a tribal fisheries buyer was at a house near Guidry's residence, so Guidry would catch his fish, load them in the back of his truck, and take them to the buyer. [RP 163] Guidry testified that he remembered Officer Klein contacting him on the Yelm Highway on January 11, 2005. [RP 192] He said he was authorized by the tribe to sell his fish there because on that day, the tribal fisheries buyer had quit buying. [RP 193].

Officer Klein testified that a "commercial quantity" of salmon is defined as more than three times the recreational limit, which is two adult salmon, or more than \$250 worth. [RP 66, 75, 104] Each of the State's witnesses who participated in the surveillance of

Guidry from December 18-21, 2005, testified that Guidry caught a commercial quantity of fish each day. [RP 65-66, 83-84, 104, 107, 112, 113] They observed Guidry fishing in his boat and unloading fish from the boat and from a gillnet in the boat into his truck. [65, 72, 92, 100] Since gillnets are used for commercial fishing, Guidry was fishing in a commercial manner. [RP 65-66, 70, 72, 75, 92, 100]

Guidry corroborated the witnesses' testimony with his own testimony. He testified that when he took his fish to the buyer, he would pull his tailgate down, and [the buyer] would pitch the fish with a fish pew into the scale, "weigh them up," and write down the weights on a fish receiving ticket. [RP 164] The buyer would indicate on the fish receiving ticket the type of gill net Guidry used to catch the fish, and whether the fish were caught on-reservation or off. [RP 166] In admitting these facts, Guidry confirmed that when he sold the salmon he caught, it always was a commercial quantity. Finally, during Guidry's sentencing, his attorney said,

Your Honor, Mr. Guidry committed his crimes in the open, he did them above board, he never tried to hide what he did. He testified – he basically confessed to all the crimes when he testified on the stand. When he was confronted by the Fish and Game individuals, he, again, confessed to them as to what he was doing. [RP 274]

See RP 277 (“[Guidry] admitted to all of the facts.” Construing all evidence in a light most favorable to the State, the record contains sufficient evidence to support all elements of Counts 1 and 2, even though the trial court’s Finding of Fact contained an element that one officer neglected to mention. The trial court did not abuse its discretion in finding Guidry guilty beyond a reasonable doubt of Counts 1 and 2.

b. The evidence in the record is sufficient to support Guidry’s convictions for Counts 3-10, even though a few of the trial court’s Findings of Fact and Conclusions of Law appear to reflect confusion in the court’s understanding of the issues.

To convict Guidry of Counts 3-10, the State had to prove all of the elements of Participation of Non-Indian in Indian Fishery for Commercial Purpose—RCW 77.15.570(2) (counts 3-6), and Commercial Fishing without a License, First Degree—RCW 77.15.500(2) (counts 7-10). The elements for RCW 77.15.570(2) are:

On or about the 18th through the 21st day of December, 2005, in the County of Thurston, State of Washington, the above-named Defendant, who is not a treaty Indian fisherman, with the intent of acting for commercial purposes, including any sale of catch or profit from catch, did participate in the taking of fish or shellfish in a treaty Indian fishery and/or was on board a vessel, or associated equipment, operating in a treaty Indian fishery; and the defendant’s spouse, who is a treaty Indian, was not present at the fishing site.

The elements for RCW 77.15.500(2) are:

On or about the 18th through the 21st day of December, 2005, in the County of Thurston, State of Washington, the above-named Defendant fished for, took, or delivered food fish, shellfish, or game fish while acting for commercial purposes, and did not hold a fishery license or delivery license under chapter 77.65 RCW for the food fish or shellfish and/or was not a licensed operator designated as an alternate operator on a fishery or delivery license under chapter 77.65 RCW for the food fish or shellfish; and the violation involved taking, delivering, or possessing food fish or shellfish with a value of two hundred fifty dollars or more, and/or the violation involved taking, delivering, or possessing food fish or shellfish from an area that was closed to the taking of such food fish or shellfish by any statute or rule.

Guidry assigns error to the trial court's Findings of Fact 8, 9, and 11 and Conclusions of Law 1 and 3-8 in providing sufficient evidence to convict him beyond a reasonable doubt of Counts 3-10.

Findings of Fact 8, 9, and 11 read:

Finding of Fact 8: Exhibit #3, which was admitted into evidence, is composed of three tribal fish tickets that the defendant used to sell the chum salmon he caught on December 18, 19, and 20, 2005. It is clear from the information on these tickets that on December 18 and 19, 2005, the defendant was fishing off the Nisqually Indian Reservation but within the Nisqually Indian's usual and accustomed fishing area.

Finding of Fact 9: In response to a question about whether a non-tribal member can use the Nisqually tribal code to fish without his or her tribal spouse member, the court finds that the Riverbend Campground, where the defendant launched his boat, is not on the Nisqually Indian Reservation.

Finding of Fact 11: In answer to the question of whether tribal code can supersede state statute, the court finds that the Nisqually Tribal Code does not allow a non-Indian to fish in a tribal fishery unless the tribal spouse is on the boat, sorting fish, or tending the nets with the non-tribal spouse.

The trial court's Conclusions of Law 1 and 3-8 read:

Conclusion of Law 1: This Court has jurisdiction over the parties and subject matter.

Conclusion of Law 3: The Court finds that Nisqually Tribe's 1957 resolution, and the governor's proclamation, control.

Conclusion of Law 4: On December 18 through 21, 2005, the defendant's wife needed to be assisting him, but she was not.

Conclusion of Law 5: It is clear that the State's statute, RCW 77.15.570, goes to on- and off-reservation and usual-and-accustomed areas.

Conclusion of Law 6: The defendant caught fish off the Nisqually Indian Reservation on December 19th through December 21, 2005. He may have caught his fish on the reservation on December 18, 2005. On all of those days, he may have been fishing outside of the Nisqually Tribe's usual and accustomed area.

Conclusion of Law 7: Commercial fishing is defined as when the defendant deploys his net in the water and begins floating.

Conclusion of Law 8: The Defendant is Guilty beyond a reasonable doubt of the offenses of:

1. ENGAGING IN FISH DEALING ACTIVITY – UNLICENSED, FIRST DEGREE, RCW 77.15.620(3), committed on January 11, 2005.

2. UNLAWFUL TRAFFICKING IN FISH, SHELLFISH, OR WILDLIFE, FIRST DEGREE, RCW 77.15.260(2), committed on January 11, 2005.
- 3-6. PARTICIPATION OF NON-INDIAN IN INDIAN FISHERY FOR COMMERCIAL PURPOSE, X4, RCW 77.15.570(2), committed on December 18 through 21, 2005.
- 7-10. COMMERCIAL FISHING WITHOUT A LICENSE, FIRST DEGREE, X4, RCW 77.15.500(2), committed on December 18 through 21, 2005.
11. OBSTRUCTING A LAW ENFORCEMENT OFFICER (ON OR AFTER MAY 14, 2001), RCW 9A.76.020(1), committed on December 21, 2005. [CL 8]

The record supports Finding of Fact 8, that “on December 18 and 19, 2005, [Guidry] was fishing off the Nisqually Indian Reservation but within the Nisqually Indian’s usual and accustomed (U&A) fishing area. [FF 8] Guidry always launched his boat at the Riverbend Campground on the Nisqually River, downriver from the Nisqually Indian Reservation but within the Nisqually Tribe’s U&A. [RP 61-63, 70, 72]

The record shows that Guidry fished upstream of the Riverbend Campground on December 18 and 20, 2005; that he fished upstream and downstream of the campground on December 19, 2005; and that he fished downstream on December 21, 2005. [RP 73, 83, 90, 92, 98, 100, 107, 112] Under RCW 77.08.010(46), “fishing” is defined as an effort to kill, injure, harass, or catch a fish. If a person is in a boat and has equipment to catch fish, he or she is

considered to be fishing. [73] Therefore, Guidry was fishing off the reservation but within the Nisqually Tribe's U&A each of the four days as he launched his boat at the Riverbend Campground and, with gillnet in hand, proceeded in either direction to fish.

The record supports Finding of Fact 9, that "the Riverbend Campground, where the defendant launched his boat, is not on the Nisqually Indian Reservation." [FF 9; RP 63, 70]

The record and the law, as explained in Section 1 of this brief, support Finding of Fact 11, that "the Nisqually Tribal Code does not allow a non-Indian to fish in a tribal fishery unless the tribal spouse is on the boat, sorting fish, or tending the nets with the non-tribal spouse." [FF 11]

The record supports Conclusions of Law 1 and 3-8. Conclusion of Law 1 is that "the trial court had jurisdiction over the parties and the subject matter." [CL 1] The State has criminal jurisdiction over non-Indians who commit victimless crimes and crimes against non-Indians, whether on-reservation or off. *Washington v. Lindsey*, 133 Wash. 140, 144, 233 P. 327 (1925); *State v. Reber*, 171 P.3d 406, 408 (Utah), *cert. denied*, 128 S. Ct. 490 (2007); *Solem v. Bartlett*, 465 U.S. 463, 465 n.2, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984), citing *New York ex rel. Ray v.*

Martin, 326 U.S. 496 (1946). A tribe cannot own the fish and game on its reservation, so it cannot be a victim of a crime against the fish and game. *State v. Reber*, 171 P.3d at 409, citing *White Mountain Apache Tribe v. Arizona Dep't of Game and Fish*, 649 F.2d 1274, 1283 (9th Cir. 1981). These crimes are victimless. *State v. Reber*, 171 P.3d at 409. No matter where a non-Indian fishes, he or she can take fish only as allowed by state law. *Puget Sound Gillnetters Ass'n v. U.S. District Court*, 573 F.2d 1123, 1132 (9th Cir. 1978), *vacated on other grounds*, 443 U.S. 658 (1979). A defendant who fails to show that he or she is a member of a tribe entitled to exercise treaty rights is subject to state law to the same extent as other citizens. *Id.* at 1130.

Here, the Nisqually Tribe has no property interest in living fish and game upon its reservation and in its U&A. Guidry's status as a non-Indian and his failure to abide by state law while participating in the Nisqually treaty Indian fishery constitutes a victimless crime. The State had criminal jurisdiction over him.

In addition to its jurisdiction over Guidry for victimless crimes, the State also has jurisdiction over Guidry by virtue of a 1957 resolution by the Nisqually Tribe. This resolution gives the State criminal and civil jurisdiction over "the peoples of the

Nisqually Indian Community, and all persons being and residing upon the Nisqually Indian Reservation . . .” *State v. Squally*, 132 Wn.2d 333, 339; 937 P.2d 1069, 1072 (1997). When Governor Rosellini received the tribe’s resolution, he issued a proclamation granting the State civil and criminal jurisdiction “to the Nisqually Indian people, their reservation, territory, lands and country, and all persons being and residing therein.” *Id.* at 339.

The State has jurisdiction over Guidry via the Tribe’s resolution and the governor’s proclamation. [FF 1] This jurisdiction applies on-reservation, in the Nisqually Tribe’s U&A, and off-reservation. Guidry must follow state law. [CL 1, 3-5] On December 18-21, 2005, Guidry’s wife needed to be assisting him, but she was not. [RP 264-65; FF11, CL 4] RCW 77.15.570 applies to Guidry whether he’s fishing on-reservation, in the Tribe’s U&A, or off-reservation. *Washington v. Lindsey*, 133 Wash. 140, 144, 233 P. 327 (1925); *State v. Reber*, 171 P.3d 406, 408 (Utah), *cert. denied*, 128 S. Ct. 490 (2007); *Solem v. Bartlett*, 465 U.S. 463, 465 n.2, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984); *State v. Squally*, 132 Wn.2d 333, 339; 937 P.2d 1069, 1072 (1997). Commercial fishing is defined as when the defendant deploys his net in the water and

begins fishing. [RP 73; CL 7] Guidry is guilty beyond a reasonable doubt of all 11 counts charged. [CL 8]

Only Conclusion of Law 6 is problematic. It reads,

Conclusion of Law 6: The defendant caught fish off the Nisqually Indian Reservation on December 19th through December 21, 2005. He may have caught his fish on the reservation on December 18, 2005. On all of those days, he may have been fishing outside of the Nisqually Tribe's usual and accustomed area.

The last sentence of Conclusion of Law 6 conflicts with Finding of Fact 8 regarding whether Guidry fished in the Nisqually Tribe's usual and accustomed area when he was off the reservation. But Finding of Fact 8 seems to suggest that the court meant in Conclusion of Law 6 to say that Guidry was fishing *in the tribe's usual and accustomed area*, and this is supported by the record. [RP 264] Ultimately, as the trial court's Conclusion of Law 3 makes clear, the location where Guidry fished has no bearing on the legality of his actions. The State has jurisdiction over him whether he is fishing on the reservation or off. *State v. Squally*, 132 Wn.2d 333, 339; 937 P.2d 1069, 1072 (1997); *Washington v. Lindsey*, 133 Wash. 140, 144, 233 P. 327 (1925); *State v. Reber*, 171 P.3d 406, 408 (Utah), *cert. denied*, 128 S. Ct. 490 (2007); *Solem v. Bartlett*, 465 U.S. 463, 465 n.2, 104 S. Ct. 1161, 79 L. Ed.

2d 443 (1984), citing *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *Puget Sound Gillnetters Ass'n v. U.S. District Court*, 573 F.2d 1123, 1130-32 (9th Cir. 1978), *vacated on other grounds*, 443 U.S. 658 (1979).

The record is sufficient to support Guidry's convictions for Counts 3-10, despite the relatively minor errors in the trial court's Findings of Fact and Conclusions of Law. Construing all evidence in favor of the state, the trial court did not abuse its discretion in finding Guidry guilty beyond a reasonable doubt of Counts 3-10.

4. The trial court did not abuse its discretion in finding Guidry guilty beyond a reasonable doubt of the 11 counts against him, because none of the counts violated the constitutional prohibition against double jeopardy.

a. Guidry's convictions for Counts 1 and 2 did not violate the constitutional prohibitions against double jeopardy.

The federal constitution and Article 1, section 9, of the Washington State Constitution protect against double jeopardy by prohibiting multiple punishments for the same offense. *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). As Guidry correctly indicates, Washington courts use a 3-part test to determine whether the legislature intended multiple punishments in a particular situation. *State v. Calle*, 125 Wn.2d at 776.

The first part of the test is determining whether the legislature meant for there to be multiple punishments in a particular situation. *State v. Calle*, 125 Wn.2d at 776. Second, if the legislature's intent is unclear, the courts turn to the *Blockburger* test, asking if the crimes are the same in fact and in law. *State v. Calle*, 125 Wn.2d at 777-78; *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). Third, if the degree of one offense is elevated by conduct constituting a separate offense, the merger doctrine may help to determine legislative intent. *State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983). Even if two convictions seem to merge at an abstract level under the third part of the test, they can be punished separately if the defendant's conduct shows an independent purpose for or effect of each conviction. *State v. Freeman*, 153 Wn.2d 765, 773, 108 P.3d 753 (2005); *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

"A trial court's determination of what constitutes the same criminal conduct will not be disturbed absent an abuse of discretion or misapplication of the law." *State v. Tili*, 139 Wn.2d 107, 122, 119 n.5, 985 P.2d 365 (1999). In the present case, the legislature meant for there to be two punishments for a person who (Count 1, RCW

77.15.620(3)) did not have a commercial fishing license and sold food fish without a wholesale dealer's license, or did have a commercial fishing license and landed and sold food fish without a direct retail endorsement; and (Count 2, RCW 77.15.260(2)) trafficked in food fish and did not have a direct retail endorsement or an anadromous game fish buyer's license. "Trafficking" is defined as "offering, attempting to engage, or engaging in sale, barter, or purchase of fish, shellfish, wildlife, or deleterious exotic wildlife." RCW 77.08.010(50).

Guidry violated Count 1 because he did not have a commercial fishing license and therefore needed a wholesale dealer's license to sell his salmon. He violated Count 2 because he attempted to engage in the sale of his salmon to WDFW Officer Carl Klein and did not have a direct retail endorsement (DRE). If Guidry had a DRE, he would not have been guilty of Count 2, but he still would have been guilty of Count 1 because he would have needed to be a licensed commercial fisherman to sell with a DRE. Conversely, if he had a wholesale dealer's license, he would not have been guilty of Count 1, but he would have been guilty of Count 2.

These crimes are not the same in law, and they are not the same in fact. Neither of them is elevated to a higher degree by conduct constituting a separate offense; each carries a more serious penalty if the amount of fish involved is a commercial quantity. Guidry violated both laws by having neither a DRE or a wholesale dealer's license. The trial court did not abuse its discretion in finding him guilty of both.

b. Guidry's convictions for Counts 3-6 and 7-10 did not violate the constitutional prohibitions against double jeopardy, so it was proper for the trial court to find him guilty of Counts 3-6 and 7-10.

In the present case, the legislature meant for there to be two punishments for a person who (Counts 3-6, RCW 77.15.570(2)) is not a treaty fisherman but participated in a treaty Indian fishery without his or her tribal spouse present at the fishing site; and (Counts 7-10, RCW 77.15.500(2)) fished for food fish while acting for commercial purposes and did not hold a commercial fishery license or delivery license and/or was not designated as an alternate operator on such a license. Guidry violated Counts 3-6 because he is not a treaty fisherman but he participated in the Nisqually tribal fishery without his Indian wife being present at the fishing site. He violated Counts 7-10 because he fished for chum

salmon for commercial purposes and did not hold a commercial food fish license or delivery license and was not designated an alternate operator on such a license.

If Guidry's wife had been present at the fishing site when Guidry participated in the Nisqually tribal fishery on December 18-21, 2005, he would not have been guilty of Counts 3-6, but he still would have been guilty of Count 7-10. This is because he would have needed a commercial food fish license or delivery license even if he were participating in the Nisqually tribal fishery. He was under the State's jurisdiction on the reservation and in the Nisqually's U&A by virtue of the Nisqually Tribe's 1957 resolution granting the State criminal and civil jurisdiction, and the fact that his crimes were victimless.

RCW 77.15.570 and RCW 77.15.500 are not the same in law or in fact. Neither of them is elevated to a higher degree by conduct constituting a separate offense; each carries a more serious penalty only if the amount of fish involved is a commercial quantity. Guidry violated both laws on each day between December 18-21, 2005. The trial court did not abuse its discretion in finding him guilty of Counts 3-10.

5. Although enforcement of RCW 77.15.570 against Guidry is not a regulation of treaty fishing, the state can regulate treaty fishing inside a tribe's reservation, in its usual and accustomed fishing areas, and outside its reservation if the regulation is non-discriminatory and necessary for conservation.

Guidry cites the *Boldt* decision for the proposition that the State cannot regulate treaty fishing on an Indian reservation. [Appellant's brief 13] But enforcing a state statute requiring the Indian spouse's presence is consistent with the policies and interpretation of the treaties in the *Boldt* decisions and in federal regulations. *State v. Price*, 87 Wn. App. 424, 432, 942 p.2d 377 (1997). Also, enforcing RCW 77.15.570 against Guidry does not regulate the Nisqually Tribe's treaty fishing rights on or off the reservation or in the Tribe's usual and accustomed (U&A) fishing places. Instead, RCW 77.15.570 prohibits non-tribal members from taking fish that are allocated to the Nisqually Tribe if the non-member is fishing alone rather than lawfully assisting a tribal member.

States can regulate treaty fishing within a tribe's reservation if the state statutes do not discriminate and are necessary for conservation. *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 165, 172-77 (1977) (*Puyallup III*).

In *Puyallup III*, the U.S. Supreme Court held that the State of Washington could regulate the Puyallup Tribe's steelhead fishery within the Puyallup Reservation where the steelhead were destined for off-reservation spawning grounds upstream. The Court said,

The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the [Medicine Creek] Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets. *Id* at 175.

In Guidry's case, Washington Department of Fish and Wildlife (WDFW) Enforcement Officer Klein testified at trial that in 2005, Guidry caught 10 percent of the escapement goal established by the State and the Tribe for chum salmon, resulting in less chum salmon returning to the Nisqually River system and less opportunity for state and tribal anglers in all subsequent seasons. [RP 271] So, even if enforcing RCW 77.15.570 against Guidry were a regulation of the Nisqually Tribe's treaty fishing rights on the Nisqually Reservation and in the Tribe's U&A, the enforcement action against Guidry would have been justified to conserve salmon stocks in the Nisqually River.

6. The trial court did not abuse its discretion in imposing restitution of \$10,000 because there was sufficient proof that the amount was causally connected to Guidry's convictions.

Washington courts have held that “while restitution must be based on ‘easily ascertainable damages,’ the amount of harm or loss ‘need not be established with specific accuracy.’” *State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350, 2005 Wash. LEXIS 719, quoting *State v. Hughes*, 154 Wn.2d 118, 154, 110 P.3d 192 (2005). However, the “evidence supporting restitution ‘is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.’” *State v. Kinneman*, 155 Wn.2d at 285, quoting *State v. Fleming*, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994).

Finally, the courts have held that the money a victim expends as a direct result of a crime, whether or not the victim is an immediate victim, can serve as a loss of property upon which restitution is based. *State v. Kinneman*, 155 Wn.2d at 287, citing *State v. Smith*, 119 Wn.2d 385, 831 P.2d 1082 (1992). Within this principle, funds for investigative costs can be considered loss of property. *State v. Kinneman*, 155 Wn.2d at 287.

In the present case, WDFW Officer Greg Haw testified that he had had numerous contacts with Guidry in the 1990s and the following decade, during which time he often provided Guidry with a copy of the State statute (RCW 77.15.570) that makes it a violation

for a non-Indian to participate in an Indian fishery. [RP 120]. Guidry's Department of Corrections (DOC) officer, Patrick Austin, testified that he met with Guidry for intake purposes in March 2005, and that during the meeting, Guidry told Officer Austin that he (Guidry) earned \$20,000-\$30,000 per year as a fisherman on the Nisqually River. [RP 117]

Officer Klein testified that he and National Oceanic and Atmospheric Administration (NOAA) special agents met several times prior to the December chum fishing season to coordinate their surveillance of Guidry. [RP 61] The surveillance lasted four days. Officer Klein and NOAA Special Agent (SA) Mickey Adkins monitored Guidry on December 18 and 19, 2005, and SAs Adkins and Daniel Austin monitored him on December 20 and 21, 2005. [64, 71, 88, 92, 113] On December 20, 2005, Officer Klein began writing an arrest warrant for Guidry and search warrants for Guidry's vehicle and residence, which the team served on December 21, 2005. [RP 76]

When the trial court sentenced Guidry, it held,

As to the \$10,000, I'm going to impose it. I think that this was pretty egregious. I think they had a lot of equipment and time and effort, and I believe that the \$10,000 would be restitution to the – and it will be paid to the Department of Fisheries Enforcement Unit. [RP 279]

The Washington Department of Fish and Wildlife had expended a great deal of money to plan and execute the investigation of Guidry. Officer Haw also spent time over the course of many years contacting Guidry and giving him a copy of the state law applicable to non-Indians' participation in Indian treaty fisheries, in an effort to get Guidry to comply with the law. The evidence afforded the trial court a reasonable basis for estimating WDFW's loss and did not subject the court to mere speculation or conjecture. The trial court did not abuse its discretion in ordering Guidry to pay \$10,000 in restitution to WDFW.

E. CONCLUSION

The trial court held that Guidry was not lawfully fishing under the Nisqually Tribal Code, because the federal courts and the Nisqually regulation do not allow a non-member to exercise treaty rights as a proxy for a tribal member. The Nisqually regulation is consistent with state law, meaning Guidry and his wife can comply with both even if she is not on the boat with him while he fishes. Guidry did not timely object to the sufficiency of the evidence for any of the 11 counts against him, and there was sufficient evidence in the record to convict him of all 11 counts even though there was

a flaw in one of the trial court's Findings of Fact and in one of its Conclusions of Law. None of the 11 counts violated the constitutional prohibition against double jeopardy. Although enforcement of RCW 77.15.570 against Guidry is not a regulation of treaty fishing, the State can regulate treaty fishing inside a tribe's reservation for conservation purposes. There was sufficient proof to impose \$10,000 in restitution against Guidry because the restitution was causally connected to his convictions. The trial court did not abuse its discretion in any of the above holdings. The State respectfully asks this Court to affirm all 11 convictions.

Respectfully submitted this 16th day of January 2009.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent 37301-7-II,
on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under laws of the State of
Washington that the foregoing is true and correct.

Dated this 16th day of January, 2009, at Olympia, Washington.

TONYA MAIAVA

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