

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

NO. 38738-7-II

COURT OF APPEALS
DIVISION II
10 JAN -5 AM 11:56
STATE OF WASHINGTON
BY a
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

ELIZABETH STALLINGS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 07-1-00153-0

BRIEF OF RESPONDENT

BRIAN WENDT, WSBA #40537
Deputy Prosecuting Attorney

Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, WA 98362-3015
(360) 417-2297 or 417-2296

Attorney for Appellant

SERVICE	Ms. Jodi Backlund Backlund and Mistry 203 East 4th Avenue, Suite 404 Olympia, WA 98501	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: January 4, 2010, at Port Angeles, WA <u>Brian Wendt</u>
---------	---	--

TABLE OF CONTENTS

Table of Authorities	iii
I. Issue Statement	1
II. Statement of the Case	1
A. Jury Trial Waiver	1
B. Facts/Conclusions from Bench Trial.....	2
C. Restitution Order	5
III. Argument	6
A. Ms. Stallings waived the right to a jury trial.	6
1. Claim	
.....	6
2. Washington case law articulates when a defendant	
validly waives the right to a jury trial.	
.....	8
3. Washington’s appellate courts repeatedly uphold	
waivers where the trial courts do not advise the	
defendant of every aspect of the jury trial right.	
.....	11
4. The record affirmatively shows that Ms. Stallings	
made a valid waiver of her right to a jury trial.	
.....	14
5. A <i>Gunwall</i> analysis is not necessary to decide the	
present case.	
.....	22
B. The trial court did not err when it imposed the	
restitution order.	23

IV. Conclusion	27
Appendix	A

TABLE OF AUTHORITIES

<u>CONSTITUTIONAL PROVISIONS</u>	<u>PAGE</u>
Wash. Const. Art. I § 21	7, 8
Wash. Const. Art. I § 22	7, 8
<u>CASE LAW</u>	<u>PAGE</u>
<i>Pasco v. Mace</i> , 98 W.2d 87, 653 P.2d 618 (1982)	9
<i>Seattle v. Williams</i> , 101 Wn.2d 445, 680 P.2d 1051 (1984)	9
<i>State v. Anderson</i> , 72 Wn. App. 453, 864 P.2d 1001 (1994)	9
<i>State v. Brand</i> , 55 Wn. App. 780, 780 P.2d 894 (1989)	10, 11, 17, 22
<i>State v. Bush</i> , 34 Wn. App. 121, 659 P.2d 1127 (1983)	23
<i>State v. Griffith</i> , 164 Wn.2d 960, 195 P.3d 506 (2008)	22
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)	7, 21
<i>State v. Hobble</i> , 126 Wn.2d 283, 892 P.2d 85 (1985)	9
<i>State v. Hahn</i> , 100 Wn. App. 391, 996 P.2d 1125 (2000)	23
<i>State v. Kinneman</i> , 155 Wn.2d 272, 119 P.3d 350 (2005)	23
<i>State v. Lohr</i> , 130 Wn. App. 904, 125 P.3d 977 (2005)	23
<i>State v. Lund</i> , 63 Wn. App. 553, 821 P.2d 508 (1991)	11, 12
<i>State v. Orange</i> , 78 Wn.2d 571, 478 P.2d 220 (1970)	13, 21
<i>State v. Pierce</i> , 134 Wn. App. 763, 142 P.3d 610 (2006)	passim
<i>State v. Pollard</i> , 66 Wn. App. 779, 834 P.2d 51 (1992)	23

<i>State v. Sanders</i> , 66 Wn. App. 380, 832 P.2d 1326 (1992)	13, 21
<i>State v. Stegall</i> , 124 Wn.2d 719, 881 P.2d 979 (1994)	passim
<i>State v. Valdobinos</i> , 122 Wn.2d 270, 858 P.2d 119 (1993)	12
<i>State v. Woo Won Choi</i> , 55 Wn. App. 895, 781 P.2d 505 (1989) ..	passim
<i>State v. Woods</i> , 90 Wn. App. 904, 953 P.2d 834 (1998)	22, 23

<u>STATUTE</u>	<u>PAGE</u>
----------------	-------------

RCW 9.94A.753	23
---------------------	----

<u>COURT RULES</u>	<u>PAGE</u>
--------------------	-------------

CrR 6.1	9
---------------	---

I. ISSUE STATEMENT

1. Did Ms. Stallings validly waive her right to a jury trial?
2. Did the trial court err when it ordered Ms. Stallings to pay \$3,505 in restitution?

II. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts as adequate the “Statement of Facts and Prior Proceedings” that appears in the Appellant’s Opening Brief, with the following additions and clarifications:

A. Jury Trial Waiver

On April 2, 2007, Ms. Elizabeth Stallings received and signed a document that advised her of her constitutional rights, including “[t]he right to a speedy and public trial by jury” and that she “is presumed innocent until a charge is proven beyond a reasonable doubt ...” CP TBD “Defendant’s Rights” (Appendix A). Ms. Stallings stated that she read and did not have any questions regarding this document. RP (04/02/2007) at 5.

On December 1, 2008, Ms. Stallings’ attorney informed the trial court that his client had elected to have the case go to a bench trial. RP (12/01/2008) at 7-8. According to defense counsel, Ms. Stallings understood that her right to a jury trial was “significant,” but “[a]fter careful consideration and reviewing all of her options and strategy, she and I believe it would be best to carry this matter to a bench trial.” RP

(12/01/2008) at 7-8. Ms. Stallings then affirmed that she had discussed the matter with her attorney, and that it was her intent to waive her jury trial right. RP (12/01/2008) at 13.

The trial court then engaged in an extensive colloquy with Ms. Stallings regarding the significant value of a jury trial. RP (12/01/2008) at 13-14. The trial court emphasized that Ms. Stallings had a right to a 12 person jury, and that each juror had to agree on the verdict in order for the State to prove the charges against her. RP (12/01/2008) at 13-14. Ms. Stallings, again, affirmed her wish to proceed to a bench trial. RP (12/01/2008) at 13-14.

Ms. Stallings informed the trial court that she had made the decision to waive her right to a jury “freely and voluntarily.” RP (12/01/2008) at 14-15. Ms. Stallings then signed a written waiver, which the court subsequently filed. CP 33.

B. Facts/Conclusions from the Bench Trial

In March 2007, FKC Limited (FKC) manufactured equipment that involved the use of a significant amount of high quality stainless steel components. RP (12/03/2008) at 35. On its property, FKC had two storage areas: one near the factory for materials being used on a daily basis; and a second, more remote, open area called the “bone-yard” where it stored materials needed on a less frequent basis. RP (12/03/2008) at 35.

On or about March 17, 2007, Ms. Stallings was seen removing stainless steel pieces from the bone yard. RP (12/03/2008) at 35. Ms. Stallings was observed by Michael Pace and Michelle Pace, who live across the street from FKC. RP (12/03/2008) at 36. RP (12/02/2008) at 132, 142. According to Mr. Pace, Ms. Stallings made two trips from the FKC property with armfuls of metal materials, which she placed into the backseat of her vehicle. RP (12/03/2008) at 36; RP (12/02/2008) at 135, 138-39. According to Mrs. Pace, Ms. Stallings carried several metal screens, enough to fill the back seat of her vehicle. RP (12/02/2008) at 145-46, 150-51.

On March 30, 2007, Jed Beery, an FKC employee witnessed Ms. Stallings exiting the FKC property. RP (12/03/2008) at 36. At that time, Ms. Stallings was trying to remove a six (6) foot length of six (6) inch diameter stainless pipe using a dolly. RP (12/03/2008) at 37; RP (12/02/2008) at 72. The pipe weighed approximately 80 lbs. RP (12/03/2008) at 37; RP (12/02/2008) at 72. Ms. Stallings did not succeed in removing the pipe from the property due to its size and the fact that Mr. Beery was able to confront her and summon the police. RP (12/03/2008) at 37; RP (12/02/2008) at 72-74.

Ms. Stallings admitted that she took two stainless steel screens. RP (12/03/2008) at 37; RP (12/02/2008) at 214, 221, 223. These two screens

had an approximate value of \$150 each. RP (12/03/2008) at 37. Ms. Stallings, also, admitted that she knew the property from which she removed the screens was marked “private property” and had numerous “no trespassing” signs. RP (12/03/2008) at 38.

David Campbell, another FKC employee, testified that the metal screens that Ms. Stallings admitted to removing from his employer’s property weighed a little over 1 pound, and had a dimension of 7 x 18 inches. RP (12/02/2008) at 108-09, 128. According to Mr. Campbell, 250 screens were missing from the FKC property. RP (12/02/2008) at 109, 130.

The State introduced evidence that Ms. Stallings recycled 229 lbs of “304 stainless”¹ steel at a metal recycler in Tacoma, Washington. RP (12/03/2008) at 38; RP (12/02/2008) at 168. Ms. Stallings received \$265 for the amount of metal she recycled on that date. RP (12/03/2008) at 38. The trial court concluded that Ms. Stallings obtained the metal that she recycled in Tacoma from the FKC property. RP (12/03/2008) at 38-40.

Based upon the evidence and testimony admitted at trial, the court found Ms. Stallings guilty of Theft in the Second Degree and Trafficking in Stolen Property in the Second Degree. RP (12/03/2008) at 42; CP 6.

¹ “304 stainless” is a grade of stainless steel that is for high acidic areas where corrosion is a serious concern. RP (12/02/2008) at 243-247. “304 stainless steel” is the same type of metal that was stolen from the FKC property. *See* RP (12/03/2008) at 11.

C. Restitution Order

At the restitution hearing, the trial court reviewed the facts that it found at the previous bench trial:

[V]arious stainless steel items had been stolen from FKC by Ms. Stallings. The value totaled at least \$250 based on her admission that she had taken two of the screens which had a value of \$150.00 each, total value of \$300. The Court also found that if you added in the \$265.00 amount, based on the receipt from Mr. Campbell (sic) for recycled stainless steel items, that would not get us to the \$1500.00 Theft one barrier and that's why the Court found her guilty of Theft in the second degree.

RP (06/11/2009) at 2-3. Defense counsel did not dispute these findings.

RP (06/11/2009) at 3.

The State introduced a list of items that FKC claimed had been stolen from its property between March and April 2007. RP (06/11/2009) at 7, 10, 14-15. The State, also, introduced the replacement values for each article itemized on the list. RP (06/11/2009) at 7.

The court ordered Ms. Stallings to pay \$3,305 in restitution. CP 32.

The trial court reasoned:

Therefore, it is the determination of the Court, based upon a preponderance of the evidence, that Ms. Stallings stole at least the \$265 worth of materials sold to a recycler in Tacoma, and at least two armloads of stainless steel screens which she was observed taking by the neighbors. The court estimates that she would be able to carry at least ten such screens in an armload, and the replacement costs of those screens, according to the uncontroverted testimony of Mr. Campbell, is \$152 each. The theft of 20 screens at this

replacement cost yields restitution of \$3,040, which when added to the \$265, yields total restitution of \$3,305, and that is the determination of the Court.

CP 32.

III. ARGUMENT

A. MS. STALLINGS WAIVED THE RIGHT TO A JURY TRIAL.

1. Claim

Ms. Stallings recycles the same argument that this Court rejected in *State v. Pierce*, 134 Wn. App. 763, 142 P.3d 610 (2006). Appellant's Opening Brief at 6-18. Ms. Stallings asks this Court to reconsider its holding in *Pierce* because it failed to outline any test to determine the validity of a criminal defendant's waiver of the right to a jury trial. Appellant's Opening Brief at 17 n. 4.

Ms. Stallings claims that the waiver of her right to a jury trial was invalid under Washington's state constitution. Appellant's Opening Brief at 6-18. According to Ms. Stallings, a valid waiver of the state constitutional right requires more than what is needed to waive the corresponding federal right. Appellant's Opening Brief at 6-18. She argues that a waiver of the state constitutional right to a jury trial is valid only if a criminal defendant is made fully aware of the following: the right to participate in jury selection, the right to a fair and impartial jury, the right

to a 12-person jury, the right to be presumed innocent until proven guilty beyond a reasonable doubt, and the right to a unanimous verdict. Appellant's Opening Brief at 7. Ms. Stallings does not provide any authority to support the proffered list of rights that she believes the trial court should have reviewed with her in the present case.

Instead, Ms. Stalling presents an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986),² arguing that the state constitutional right to a jury trial is more expansive than its federal counterpart. Appellant's Opening Brief at 6-18. Ms. Stallings concludes, without explanation, that *Gunwall* provides the necessary framework to determine when additional safeguards are required to show that a defendant waives his or her right to a jury trial under the state constitution. Appellant's Opening Brief at 17 n. 4.

Ms. Stallings, also, cites Article I, §§ 21³ and 22,⁴ of the Washington constitution, claiming they require the courts to stringently

² The *Gunwall* case describes six nonexclusive criteria to determine whether Washington's state constitution extends broader rights to its citizens than does the United States constitution. 106 Wn.2d at 58. The six criteria are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) whether the matter is of particular state interest or local concern. *Gunwall*, 106 Wn.2d at 61-62.

³ The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or

examine any waiver of a defendant's right to a jury trial. Appellant's Opening Brief at 6-9. She argues that textual differences between the state and federal constitutions demonstrate that the waiver of the state constitutional right requires more than a waiver of the corresponding federal right. Appellant's Opening Brief at 6-9. She does not cite authority for these propositions. She only claims that her waiver was invalid because the record does not demonstrate that she understood certain aspects of her jury trial right.

2. Washington case law articulates when a defendant validly waives the right to a jury trial.

Contrary to Ms. Stallings' assertion, this Court's decision in *State v. Pierce* provides the lower courts with the necessary guidance to evaluate the validity of a criminal defendant's waiver of the right to a jury trial:⁵

more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto. Wash. Const. art. I, § 21.

⁴ In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases. Wash. Const. art. I, § 22.

⁵ The following is an excerpt from this Court's decision in *State v. Pierce*, 134 Wn. App. 763, 770-772, 142 P.3d 610 (2006). Ms. Stallings asks that this Court reconsider its holding in *Pierce* because it "did not articulate *any* test for determining the requisites of a valid waiver under the state constitution." Appellant's Opening Brief at 17. However,

Rules on jury trial waiver[.]

Washington courts have already determined that the right to trial by jury under Washington's state constitution is broader than the federal constitutional jury trial right. *State v. Hobble*, 126 Wn.2d 283, 298, 892 P.2d 85 (1985) (citing *Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982)). For example, the court in *Pasco* held that the state constitution, unlike the federal, provides the right to a jury trial for any adult criminal offense, including petty offenses. *Pasco*, 98 Wn.2d at 99.

Washington already has rules governing a defendant's waiver of the jury trial right. A defendant may waive the right as long as the defendant acts knowingly, intelligently, voluntarily, and free from improper influences. *State v. Stegall*, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994). We will not presume that the defendant waived his jury trial right unless we have an adequate record showing that the waiver occurred. *State v. Woo Won Choi*, 55 Wn. App. 895, 903, 781 P.2d 505 (1989), *superseded on other grounds as recognized by State v. Anderson*, 72 Wn. App. 453, 458-59, 864 P.2d 1001 (1994) (citing *Seattle v. Williams*, 101 Wn.2d 445, 451, 680 P.2d 1051 (1984)).

In examining the record, we consider whether [the defendant] was informed of his constitutional right to a jury trial. *Woo Won Choi*, 55 Wn. App. at 903. We also examine the facts and circumstances generally, including [the defendant's] experience and capabilities. *Woo Won Choi*, 55 Wn. App. at 903. A written waiver as CrR 6.1(a)⁶ requires, is not determinative but is strong evidence that the defendant validly waived the jury trial right. *Woo Won Choi*, 55 Wn. App. at 904. An attorney's representation that

Pierce outlined clear rules for the trial courts to follow when determining whether criminal defendants knowingly, intelligently, and voluntarily waive their right to a jury trial. The reasoning in *Pierce* is sound, and this Court should not stray from its previous holding.

⁶ CrR 6.1(a) provides: Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.

his client knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant. *Woo Won Choi*, 55 Wn. App. at 904. Courts have not required an extended colloquy on the record. *Stegall*, 124 Wn. 2d at 725, 881 P.2d 979; *State v. Brand*, 55 Wn. App. 780, 785, 780 P.2d 894 (1989). Instead, Washington requires only a personal expression of waiver from the defendant.

Washington's rule on jury trial waiver contrasts with the rules for waiving other rights. For example, when a defendant wishes to waive the right to counsel and proceed pro se, the trial court must usually undertake a full colloquy with the defendant on the record to establish that the defendant knows the relative advantages and disadvantages of proceeding pro se. *Stegall*, 124 Wn.2d at 725. A guilty plea, which involves waiving numerous trial rights, is valid if the record shows not only a voluntary and intelligent waiver, but also an understanding of the waiver's direct consequences. *Stegall*, 124 Wn.2d at 725.

The right to jury trial, like the right to remain silent and the right to confront witnesses, is treated differently and is easier to waive. See *Brand*, 55 Wn. App. at 786. The trial strategy of any particular case may perhaps dictate the waiver of one or more of these rights while still preserving to the accused the right to a fair trial. *Brand*, 55 Wn. App. at 786. For example, competent defendants and experienced counsel may have good reasons to waive a jury trial, believing that their defense would be better understood and evaluated by a judge than by jurors who may be less sympathetic to technical legal contentions. *Brand*, 55 Wn. App. at 786-87.

Pierce, 134 Wn. App. at 770-772 (emphasis added).

///

///

3. Washington's appellate courts repeatedly uphold waivers where the trial courts do not advise the defendant of every aspect of the jury trial right.

In *State v. Woo Won Choi*, the reviewing court upheld a jury waiver where the defendant made unequivocal answers (“yes, sir”) to the questions: whether he understood his rights, if his counsel had explained them to him, and if it was his desire to waive his right to a jury trial. 55 Wn. App. at 900, 904. Important to the appellate court was that the defendant had an adequate grasp of the English language; and the court, defense counsel, and the defendant discussed the nature of a jury trial and the meaning of the word “waiver.” *Woo Won Choi*, 55 Wn. App. at 904.

In *State v. Brand*, the defendant waived his right to a jury trial, both in open court and by filing a written waiver. 55 Wn. App. at 783. The reviewing court upheld the waiver as valid where the colloquy generally addressed waiving the right to a jury. *Brand*, 55 Wn. App. at 784, 789-90. In the appellate court’s opinion, the trial court had “fully” discussed the right to a jury trial when the defendant affirmed (1) he knew he had a right to proceed to a trial by jury, (2) he had elected to proceed to a bench trial, and (3) he had no questions about that decision. *Brand*, 55 Wn. App. at 789-90. There was no mention of the number of jurors, that every member of the jury would have to agree on a verdict, or that the defendant would

be able to participate in the jury selection process. *Brand*, 55 Wn. App. at 789-90.

In *State v. Lund*, the defendant signed a written waiver of his right to a jury trial after a brief colloquy with his attorney and the trial judge. 63 Wn. App. 553, 555, 821 P.2d 508, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1991). The court's colloquy advised the defendant of his right to have 12 jurors hear the case. *Lund*, 63 Wn. App. at 557. While the judge mentioned the process of jury selection, there was no mention of the defendant's participation therein. *Lund*, 63 Wn. App. at 557. After the trial court informed the defendant that he would not be able to appeal factual findings if he elected to proceed to a bench trial, the defendant indicated that he had a reservation, took an additional moment to discuss the issue with counsel, and then affirmed his intent to waive the jury. *Lund*, 63 Wn. App. at 557-58. The reviewing court found this colloquy to be sufficient. *Lund*, 63 Wn. App. at 559.

In *State v. Valdobinos*, the Supreme Court upheld the validity of the jury waiver where the colloquy only consisted of the court asking whether the defendant understood he was "giving up [the] right to a jury trial," conferring with counsel, then acknowledging that he was giving up this right. 122 Wn.2d 270, 287-88, 858 P.2d 199 (1993). There was no

mention of the number of jurors *vis-à-vis* the judge, or that the jurors would all have to agree on the verdict. *Valdobinos*, 122 Wn.2d at 287-88.

In *State v. Pierce*, this Court recently upheld a defendant's waiver of a jury trial where (1) the defendant filed a signed, written waiver, (2) defense counsel stated that he had discussed the issue of waiver with the defendant, (3) the trial court inquired whether the defendant understood that he was waiving his right to have the case considered by 12 jurors, who would have to agree on the verdict, and (4) the defendant affirmed that he was waiving his right to a jury trial voluntarily. 134 Wn. App. at 767-68. This Court expressly rejected the argument that a greater inquiry was required under the state constitution. *Pierce*, 134 Wn. App. at 772-73.

Ms. Stallings fails to cite any case that supports her argument that the trial court must review every aspect of a defendant's right to a jury trial before it accepts a valid waiver. While Washington's constitution requires criminal trials to be presented to a 12-person, impartial jury, *see* Wash. Const. art I, §§ 21, 22, the presumption of innocence before a 12 person jury is inherent in all criminal trials and does not require specific advisement. *See Pierce*, 134 Wn. App. at 772-73 (citing *State v. Sanders*, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992) (right to an impartial trier of

fact); *State v. Orange*, 78 Wn.2d 571, 573, 478 P.2d 220 (1970) (right to proof beyond a reasonable doubt)).

Washington's appellate courts do not require the trial courts to review every aspect of a defendant's right to a jury before the waiver of said right is valid. Instead, waiver of the jury trial right only requires a knowing, intelligent, and voluntary act which can be shown via the defendant's personal expression or an indication that the court or defense counsel has discussed the matter with the defendant. *See Stegall*, 124 Wn.2d at 724-25.

4. The record affirmatively shows that Ms. Stallings made a valid waiver of her right to a jury trial.

This Court should hold that Ms. Stallings waived her jury trial right. The record demonstrates overwhelming evidence that Ms. Stallings understood that she had a "valuable" right to a jury trial, and that she knowingly, intelligently and voluntarily waived that right in the present case.

First, Ms. Stallings was informed of her constitutional rights at the outset of the case against her. Ms. Stallings signed a document entitled "Defendant's Rights" on April 2, 2007. Appendix A. This document explicitly states that she has "[t]he right to a speedy and public trial *by jury*" and that she "is presumed innocent until a charge is *proven beyond a*

reasonable doubt ...” Appendix A. The document asserts that Ms. Stallings read and/or had the form explained to her in open court before the presiding judge. Appendix A. This Court should find that Ms. Stallings was informed of her constitutional right to a jury trial as required by case law. *Pierce*, 134 Wn. App. at 771; *Woo Won Choi*, 55 Wn. App. at 903

Second, Ms. Stallings had the ability to understand her constitutional rights. At Ms. Stallings first appearance, the trial court made the following inquiry:

The Court: You have a list of your rights, have you had a chance to look those over?

The Defendant: Yes, yes I have.

The Court: Any -- you don't have any difficulty reading, any questions on your rights?

The Defendant: No, I have glasses.

The Court: So, if you'd sign that for me all that does is acknowledge that you've received them.

RP (04/02/2007) at 5. Ms. Stallings professed that she (1) read her rights, and (2) did not have any questions for the judge regarding those rights. Accordingly, she signed the advisement of rights. Appendix A. This Court should find that Ms. Stallings' ability to understand said rights is relevant to the analysis that she validly waived her right to a jury trial in the present

case. *See Pierce*, 134 Wn. App. at 771; *Woo Won Choi*, 55 Wn. App. at 903.

Third, the facts and circumstances leading to the start of trial demonstrate that Ms. Stallings knowingly and intelligently waived a jury trial. For more than a year Ms. Stallings demanded that the present matter be set for a jury trial. *See e.g.* RP (05/31/2007) at 5; RP (12/01/2008) at 1. However, Ms. Stallings elected to proceed to a bench trial after discussing her legal options and preferred strategy with her attorney:

Mr. Feste: Yes, Your Honor, Jonathan Feste on behalf of Ms. Stallings. I came to the courthouse this afternoon to talk to Mr. Greenspan [deputy prosecutor], Ms. Stallings happened to be in the courthouse to deal with another small matter and she and I have spent approximately the past 30, 35 minutes visiting [with her] about her options. *She knows of her constitutional right -- right to a jury trial is a significant constitutional right. After careful consideration and reviewing all of her options and strategy, she and I believe it would be best to carry this matter to a bench trial.* And so she'd like to sign a waiver, that means we would know exactly where we're standing with a jury and could notify them that they do not have to be present in the morning.

The Court: Still ready to go in the morning then?

Defense Counsel: If not then in the afternoon ...

RP (12/01/2008) at 7-8 (emphasis added). The record clearly shows that Ms. Stallings intended to exercise her constitutional right to a jury until she believed that it was in her best legal interests to present the case to the

presiding judge only. The length of time that the matter was set to go to a jury, defense counsel's representation that Ms. Stallings knew that she had a significant constitutional right to a jury trial, and defense counsel's representation that Ms. Stallings intended to waive the jury as part of her trial strategy affirms the validity of the waiver in the present case. *See Pierce*, 134 Wn. App. at 771-772; *Woo Won Choi*, 55 Wn. App at 903-04.

Fourth, Ms. Stallings' own representations to the trial court reveal that she knowingly and intelligently sought to waive her right to a jury. Ms. Stallings, herself, professed that she discussed the waiver with her attorney and that she did not have any questions.

The Court: All right. Ms. Stallings, have you read the waiver of right trial by jury?

The Defendant: Yes, I did.

The Court: Have you reviewed it with Mr. Feste?

The Defendant: Yes, I did.

The Court: Do you have any questions about the waiver?

The Defendant: No, I do not.

RP (12/01/2008) at 13. Presumably, Ms. Stallings' attorney reviewed the pros and cons of waiving her right to a jury when the two made the tactical decision to proceed to a bench trial. *See* RP (12/01/2008) at 7-8 *supra*. This Court should find that the strategic choice to waive a jury supports

the validity of Ms. Stallings' waiver in the present case. *See Pierce*, 134 Wn. App. at 771-72; *Brand*, 55 Wn. App. at 786-87 (competent defendants and experienced counsel may have good reasons to waive a jury trial, believing their defense would be better understood and evaluated by a judge than by a jury).

Fifth, while an extended colloquy is not required, the trial court reviewed the value of the right to a jury trial with Ms. Stallings.

The Court: Okay, let me go over it in detail with you just to make sure you understand.

You have the constitutional right to have a trial be tried by a jury of 12 people.

The Defendant: Yes, I understand

The Court: And it's a very valuable right. All the jury -- all 12 of the jurors must agree in order to find you guilty of the charges. If you waive that right then you're giving up -- you're saying the Court can decide which is only one person who will listen to the evidence. And that the judge finds that you are guilty beyond a reasonable doubt then that's only one person deciding rather than 12.

So, by signing this [waiver of trial by jury] you're giving up a very valuable right that you have as a defendant. You still have the right to present your testimony and present your witnesses and to argue in front of the Court as to your side of the case. But again, there will be no jury if the Court approves this waiver.

So, do you have any questions about that at all?

The Defendant: No, I do not.

RP (12/01/2008) at 13-14. Here, the trial court explicitly informed Ms. Stallings that she was waiving a “valuable” right by electing to proceed to a bench trial. The court emphasized that she had a right to a jury of 12, and that each juror had to agree before the State successfully proved (beyond a reasonable doubt) the charges against her. This Court should find that the trial court’s careful review of the jury’s valuable role, and Ms. Stallings’ steadfast desire to proceed to a bench trial, is strong evidence of a knowing waiver. *See Stegall*, 124 Wn.2d at 724-25; *Pierce*, 134 Wn. App. at 771.

Sixth, Ms. Stallings voluntarily waived her right to a jury trial and her decision was free of any coercion.

The Court: Okay, are you signing this waiver and waiving your right to a jury freely and voluntarily.

The Defendant: Yes, I am.

The Court: Okay. Do you feel you’ve had enough time to discuss it with your attorney?

The Defendant: Yes, I do.

The Court: Okay, and has anybody made any threats or try to coerce you in any way to get you to sign the waiver?

The Defendant: No.

The Court: Okay, I will go ahead and approve the waiver then, and find it was done voluntarily and without any coercion in any way or any threats, and she certainly

understands her right to have a trial by jury and she chooses to waive that.

RP (12/01/2008) at 14-15. The trial court made a concerted effort to ensure that Ms. Stallings' decision to waive a jury was free of any improper influences. Thus, this Court should find that Ms. Stallings voluntarily waived her right to a jury trial. *See Stegall*, 124 Wn.2d at 724-25; *Pierce*, 134 Wn. App. at 771.

Finally, Ms. Stallings' signed, written waiver provides strong evidence that she validly waived her right to a jury trial. Pursuant to CrR 6.1(a), the record includes Ms. Stallings' waiver of trial by jury. CP 33. While not determinative, this document supports the conclusion that Ms. Stallings made a valid waiver of her right to present her case to a jury. *See Pierce*, 134 Wn. App. at 771; *Woo Won Choi*, 55 Wn. App. at 904.

This Court should hold that Ms. Stallings validly waived her jury trial right. She received the advice of counsel and submitted her waiver in writing. CP 33; RP (12/01/2008) at 7-8. The trial court informed Ms. Stallings that she had the right to a unanimous verdict by 12 people. RP (12/01/2008) at 13-14. Ms. Stallings knew that by waiving this right, only the trial judge would decide her case. RP (12/01/2008) at 7-8, 13-14. Ms. Stallings told the trial court that (1) she understood her constitutional right

to a jury trial, and (2) she was waiving it freely and voluntarily. RP (12/01/2008) at 13-15.

Ms. Stallings does not claim that her waiver was involuntary or that she lacked knowledge of its direct consequence. As described above, the record reflects that the trial court explained to her the essence of her jury trial right. Ms. Stallings never waived her right to be presumed innocent until proven guilty beyond a reasonable doubt or her right to an impartial trier of fact because these rights are inherent in all trials. *See Pierce*, 134 Wn. App. at 772-73 (citing *State v. Sanders*, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992) (right to an impartial trier of fact); *State v. Orange*, 78 Wn.2d 571, 573, 478 P.2d 220 (1970) (right to proof beyond a reasonable doubt)).

The only right unique to a jury trial that the court did not share with Ms. Stallings was her right to participate in juror selection. However, Ms. Stallings does not explain why she may have believed that she could not participate in the jury's selection; nor does she argue that had she been informed of the right to participate in voir dire, she would have elected to proceed to a jury trial. Furthermore, Ms. Stallings cites no legal authority to support her claim that the trial court had a duty to inform her of the right to participate in juror selection before she could validly waive her jury trial right. Finally, and most importantly, she cites no authority saying

that the information the trial court reviewed with her was insufficient. This Court should hold that Ms. Stallings had enough information to validly waive her right to a jury in the present case.

5. A *Gunwall* analysis is not necessary to decide the present case.

State v. Gunwall, addresses the extent of a right and not how the right in question may be waived. 106 Wn.2d at 58; *See also Pierce*, 134 Wn. App. at 773. The sole issue in the present case is waiver. Although Washington's right to a jury trial is more expansive than the corresponding federal right, it does not automatically follow that additional safeguards are required before a more expansive right may be waived. *See Pierce*, 134 Wn. App. at 773 (citing *Brand*, 55 Wn. App. at 785 (an accused's various constitutional rights are accorded different procedural safeguards)).

This Court should hold that Washington provides clear rules to safeguard and test the validity of an accused waiver of the right to a jury trial. Pursuant to these rules, the record affirmatively shows that Ms. Stallings knowingly, intelligently, and voluntarily waived her jury trial right in the present case. This Court should reject Ms. Stallings' argument that a *Gunwall* imposes some additional and unspecified criteria to evaluate a defendant's waiver of a jury trial.

B. THE TRIAL COURT DID NOT ERR WHEN IT IMPOSED THE RESTITUTION ORDER.

A trial court's authority to impose restitution is statutory. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). 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. Woods*, 90 Wn. App. 904, 907, 953 P.2d 834 (1998). A causal connection exists when, "but for" the offense the defendant is found to have committed, the victim's loss or damages would not have occurred. *State v. Hahn*, 100 Wn. App. 391, 399, 996 P.2d 1125 (2000).

RCW 9.94A.753 precludes restitution for speculative or intangible losses. *State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). RCW 9.94A.753(3) provides that restitution shall be based on easily ascertainable damages for injury to or loss of property. "Easily ascertainable" damages are tangible damages supported by sufficient evidence. *State v. Bush*, 34 Wn. App. 121, 123, 659 P.2d 1127 (1983). "Evidence is sufficient to support a restitution order if it affords a *reasonable basis for estimating loss* and does not subject the trier of fact to mere speculation or conjecture." *State v. Lohr*, 130 Wn. App. 904, 910, 125 P.3d 977 (2005) (citing *Kinneman*, 155 Wn.2d at 27) (emphasis added).

If substantial credible evidence at the restitution hearing supports the restitution order, the trial court did not abuse its discretion. *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51, review denied, 120 Wn.2d 1015, 844 P.2d 436 (1992). The sentencing judge may rely on what is acknowledged, admitted, or shown at trial to impose restitution. *Woods*, 90 Wn. App. at 907. The State need not prove the restitution order with specific accuracy. *Kinneman*, 155 Wn.2d at 285.

Here, the judge imposed a restitution sum of \$3,505. The judge reached this figure based upon the following rationale:

Therefore, it is the determination of the Court, based upon a preponderance of the evidence, that Ms. Stallings stole at least the \$265 worth of materials sold to a recycler in Tacoma, and at least two armloads of stainless steel screens which she was observed taking by the neighbors. The court estimates that she would be able to carry at least ten such screens in an armload, and the replacement costs of those screens, according to the uncontroverted testimony of Mr. Campbell, is \$152 each. The theft of 20 screens at this replacement cost yields restitution of \$3,040, which when added to the \$265, yields total restitution of \$3,305, and that is the determination of the Court.

CP 32. This Court should find that the lower court's reasoning is supported by substantial credible evidence introduced at trial and the restitution hearing.

First, the trial court concluded that the 229 lbs of metal, which Ms. Stallings redeemed for \$265 at a recycle plant in Tacoma, Washington,

was metal she removed from FKC property. RP (12/03/2008) at 38-40. The trial court expressly rejected Ms. Stallings' explanation as to the source of the metals she recycled, finding that her testimony was simply not credible. RP (12/03/2008) at 38-40. While \$265 dollars does not reflect the true / replacement value of the metal that was stolen, the trial court did not err when it ordered Ms. Stallings to repay this sum to FKC.

Second, Ms. Stallings admitted to removing metal screens from the FKC property.⁷ RP (12/03/2008) at 37; RP (12/02/2008) at 214, 221, 223. At the restitution hearing the State provided evidence that each screen had a value of \$152. CP 32; RP (06/11/2009) at 7.

Finally, while the State never established the exact number of screens Ms. Stallings removed from the FKC property, the quantity of 20 assigned by the court is reasonable in light of the substantial, credible evidence at trial: (1) the screens in question weighed only 1 lbs each, *see* RP (12/02/2008) at 108-09, 128, (2) Ms. Stallings made two trips into the FKC property to remove said screens, *see* RP (12/03/2008) at 36; RP (12/02/2008) at 135, 138-39, (3) Ms. Stallings was observed carrying armfuls of metal screens, enough to fill up the back seat of her vehicle. RP (12/02/2008) at 145-46, 150-51, (4) Ms. Stallings recycled at least 229 lbs

⁷ The State notes that Ms. Stallings admits to stealing only two metal screens. RP (12/03/2008) at 37; RP (12/02/2008) at 214, 221, 223. *See also* Appellant's Opening Brief at 18-20.

of metal shortly after she removed the screens from the FKC property, *see* RP (12/03/2008) at 38; RP (12/02/2008) at 168, and (5) Ms. Stallings had the physical strength to lift at least 80 lbs per trip to the FKC property, *see* RP (12/03/2008) at 37; RP (12/02/2008) at 72.

This evidence allows for the reasonable conclusion that Ms. Stallings could carry at least 10 screens (*i.e.* 10 lbs) per trip from the FKC property. Because Ms. Stallings made two trips into the FKC property, each time removing armfuls of metal that filled the back seat of her vehicle, *see* RP (12/03/2008) at 36; RP (12/02/2008) at 135, 138-39, 145-46, 150-51, the trial court's estimate that Ms. Stallings removed a total of 20 screens (*i.e.* only 20 lbs) is appropriate. Based upon the evidence that the State provided at the restitution hearing, that each screen was valued at \$152, the trial court reasonably ordered an additional \$3,040 in restitution.

Because the court noted that FKC may have suffered several thefts between March and April 2007 not connected to Ms. Stallings, it refused to find Ms. Stallings responsible for the \$60,000 in property stolen from FKC (including 250 missing screens⁸). *see* CP 31-32; RP (12/02/2008) at 109, 130. Instead, the court imposed a restitution sum of \$3,305. This sum is supported by sufficient evidence and afforded a reasonable basis to

⁸ 250 metal screens would have a true / replacement value of \$38,000.

estimate FKC's losses that were causally connect to Ms. Stallings acts. This Court should affirm the restitution order in the present case.

However, should this Court find that the trial court's assessment that Ms. Stallings removed 20 screens is speculative, and not a reasonable estimate given the facts of the case, this Court should remand for a new restitution hearing.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the Ms. Stallings' conviction and restitution order. However, should this Court find that the trial court erred when it imposed a restitution sum of \$3,305, then this Court should remand for a new restitution hearing.

RESPECTFULLY SUBMITTED this January 5, 2010.

DEBORAH S. KELLY, Prosecuting Attorney



Brian Patrick Wendt, WSBA # 40537
Deputy Prosecuting Attorney

Attorney for Respondent

APPENDIX - A

SCANNED

CERTIFIED COPY

FILED
CLALLAM CO CLERK
2007 APR -2 P 3:07
BARBARA CHRISTENSEN

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

07 1 00153 0

STATE OF WASHINGTON,

Plaintiff,

vs.

ELIZABETH STALLINGS,

Defendant.

NO.

DEFENDANT'S RIGHTS

(AKAR)

The rights of the Accused include:

1. The right to remain silent before and during trial. Furthermore, the Defendant need not testify against himself or herself at trial;
2. The right to be represented by a lawyer, and if the Defendant cannot afford one, a lawyer will be provided at no expense to the Defendant and this lawyer may be present during any questioning.
3. The right to a speedy and public trial by jury;
4. The right (at trial) to confront and question witnesses who testify;
5. The right to call witnesses to testify on behalf of the Defendant and that these witnesses may be compelled to appear at trial at no expense to the Defendant;
6. The Defendant is presumed innocent until a charge is proven beyond a reasonable doubt or when the Defendant enters a plea of "guilty".
7. In the event the Defendant is found guilty after trial, the right to appeal the conviction;
8. By pleading "guilty", the Defendant waives his/her right to a trial and may not thereafter appeal the question of his/her guilt.
9. If the Defendant is not a citizen of the United States, he/she has the right to contact the consular representative of his/her own country located here in the United States, as provided in the Vienna Convention of 1963.

I, the undersigned Defendant, acknowledge that this form was read by me or to me or explained to me and was signed in open court before the presiding judge.

Witnessed by:

(Deputy) Prosecuting Attorney

Elizabeth Stallings

Defendant

Date: _____ WBA # _____

DEFENDANT'S RIGHTS

CLALLAM COUNTY
PROSECUTING ATTORNEY
Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, Washington 98362-3015
(360) 417-2301 FAX 417-2469