

No. 43578-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Scott Newcomb,

Appellant.

Pacific County Superior Court Cause No. 08-1-00161-8

The Honorable Judge Michael J. Sullivan

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

**I. The court violated Mr. Newcomb’s Sixth Amendment
right to confrontation. 1**

II. The trial court misinterpreted the restitution statute. .. 3

CONCLUSION 6

TABLE OF AUTHORITIES

FEDERAL CASES

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177
(2004)..... 1

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174
L.Ed.2d 314 (2009)..... 2

WASHINGTON STATE CASES

Sound Infiniti, Inc. v. Snyder, 169 Wn.2d 199, 237 P.3d 241 (2010)..... 4

State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012) 3

State v. Tobin, 161 Wn.2d 517, 166 P.3d 1167 (2007)..... 3

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI..... 1, 2

WASHINGTON STATUTES

RCW 9.94A.753..... 3, 4, 5

ARGUMENT

I. THE COURT VIOLATED MR. NEWCOMB'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

In 2004, the U.S. Supreme Court significantly changed its interpretation of the confrontation clause. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Under *Crawford*, testimonial evidence is inadmissible unless the witness is unavailable and the accused person had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 59.

Here, the court allowed the state to introduce testimonial evidence in the form of photographs created by Deputy Souvenier, without any showing of his unavailability and without an opportunity for cross-examination. RP (5/16/12) 102-150. Relying on a 1971 case addressing authentication of photographs, Respondent erroneously suggests that the court respected Mr. Newcomb's confrontation rights. Brief of Respondent, pp. 10-11.

This is incorrect. Authentication of evidence does not establish compliance with the confrontation clause. Furthermore, the authority cited by the state predates *Crawford* by more than 30 years. Even if the cited cases did relate to the confrontation clause, they would not have survived *Crawford*.

Crawford applies to testimonial evidence. Evidence is testimonial if it is “functionally equivalent to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). The photographs in this case are functionally equivalent to live, in-court testimony: they relay information about the scene. Respondent claims the photographs are not testimonial *statements*. Brief of Respondent, p. 11.

This is irrelevant. Neither *Crawford* nor any subsequent Supreme Court opinion limits the scope of the confrontation clause to statements. Although the Sixth Amendment was ratified just after the invention of photography, there is no reason to suspect that its drafters intended to exempt testimonial evidence other than statements from its requirements. This is especially true for evidence created by law enforcement for use at a criminal trial. *See Crawford*, 541 U.S. at 51.

Mr. Newcomb had a right to confront Deputy Souvenier. The photographic evidence substituted for the deputy’s testimony. Deputy Souvenier could have come to court to describe Mr. Newcomb’s property and the way it looked following removal of the road. Instead of doing so, he provided photographs that conveyed the same information. RP (5/16/12) 102-150. These photographs were testimonial.

A confrontation error is prejudicial unless the prosecution establishes that it is harmless beyond a reasonable doubt. *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). Here, the photos provided the only direct evidence of damage to the road. They established critical facts at trial. Because of this, Respondent cannot establish that the error is harmless beyond a reasonable doubt.

Introduction of testimonial evidence violated Mr. Newcomb's confrontation rights. Accordingly, his conviction must be reversed and the case remanded for a new trial.¹ *Jasper*, 174 Wn.2d at 117, 125.

II. THE TRIAL COURT MISINTERPRETED THE RESTITUTION STATUTE.

RCW 9.94A.753 simultaneously creates and limits a court's authority to order restitution. The court may order that restitution be paid to the victim and to third parties who incurred losses or expenses causally connected to the offense. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). The total amount of restitution may not exceed double the amount of the offender's gain or the victim's loss. RCW 9.94A.753 (3).

No published opinion has considered the argument raised by Mr. Newcomb: this case presents a legal issue of first impression. Review is therefore *de novo*. *Sound Infiniti, Inc. v. Snyder*, 169 Wn.2d 199, 206, 237

¹ The trial court also violated Mr. Newcomb's due process right to confront witnesses at the restitution hearing. See Appellant's Opening Brief, pp. 10-11.

P.3d 241 (2010). Respondent's claim that review should be for abuse of discretion is incorrect. Brief of Respondent, p. 21.

The statute's doubling provision cannot be applied to give a windfall to the victim; such an interpretation would contravene the plain language of the statute and leads to absurd results. *See* Appellant's Opening Brief, pp. 11-14. Instead, the doubling provision must be read to limit the total amount of restitution to be paid where the restitution will be paid to third parties in addition to the victim.

Here, the court erroneously interpreted the statute to authorize arbitrary doubling of the amount established by the evidence. RP (10/05/12) 16. This contravenes the plain language of the statute's doubling provision. RCW 9.94A.753 (3). The statute imposes an upper limit on the total amount of restitution. It does not grant the court authority to arbitrarily double the restitution amount owed to the victim. RCW 9.94A.753(3).

Although there are no cases addressing this argument, the rules of statutory interpretation compel this interpretation. *See* Appellant's Opening Brief, pp. 11-14. Respondent's erroneously asserts that Mr. Newcomb's interpretation "conflicts with the actual language" of the statute, because RCW 9.94A.753(3) "refers to the victim's loss and

explicitly states that this amount can be doubled.” Brief of Respondent, p. 24.

This is incorrect. Respondent quotes the doubling provision out of context and ignores the rules of statutory construction. The applicable language reads as follows:

[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

RCW 9.94A.753(3). The statute does not “explicitly state[]” that the victim’s loss can be arbitrarily doubled. Instead, it explicitly *limits* the court’s authority to impose an amount greater than double the victim’s loss.

Restitution covers “easily ascertainable damages,” “actual expenses incurred,” and “lost wages.” In light of these requirements, the only sensible interpretation of the doubling provision permits a court to order restitution to third parties only to the extent the combined total does not exceed double the victim’s loss (or double the offender’s gain).

RCWA 9.94A.753(3).

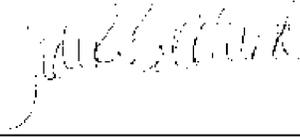
The trial court could have considered the evidence and found that the victim's loss was greater than the \$7,500. The evidence would have been sufficient to support such a finding. Given this figure, the court could have compensated any third parties, so long as the total amount did not exceed \$15,000. However, having exercised discretion and determined the amount to be \$7,500, the court lacked authority to arbitrarily double that amount. Accordingly, the restitution order must be vacated and the case remanded for a new restitution hearing.

CONCLUSION

For the foregoing reasons, Mr. Newcomb's conviction must be reversed and the case remanded for a new trial. In the alternative, the restitution order must be vacated and the case remanded for a new restitution hearing.

Respectfully submitted on September 17, 2013,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Scott Newcomb
P.O. Box 11
Naselle, WA 98632

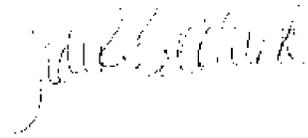
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pacific County Prosecuting Attorney
dburke@co.pacific.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 17, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

September 17, 2013 - 11:39 AM

Transmittal Letter

Document Uploaded: 435781-Reply Brief.pdf

Case Name: State v. Ross Newcomb

Court of Appeals Case Number: 43578-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:
dburke@co.pacific.wa.us