

FILED

JUL 06 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 30280-6-III

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

THE STATE OF WASHINGTON

Respondent

v.

JODY DANIELLE BORING

Appellant

BRIEF OF RESPONDENT

Mr. Mathew J. Enzler, WSBA# 38105
Deputy Prosecuting Attorney
Attorneys for Respondent

Stevens County Prosecutor's Office
215 S. Oak Street
Colville, WA
(509) 684-7500

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INDEX

ASSIGNMENTS OF ERROR.....1

ISSUE PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....2

 A. WHAT IS THE BASIS FOR ORDERING RESTITUTION
 FOR THE TOTAL SUM OF DAMAGES TO HEWES CRAFT,
 INCLUDING DAMAGES CAUSED BY CHRISTOPHER BORING...2

 B. IS THERE A CAUSAL RELATIONSHIP BETWEEN JODY
 BORING’S CONVICTION FOR TRAFFICKING IN STOLEN
 PROPERTY AND THE VICTIM’S LOSSES THAT JUSTIFY A
 RESTITUTION ORDER BASED UPON THE VALUE OF
 VICTIM’S LOSSES RELATED TO THIS OFFENSE?.....5

 C. DID THE TRIAL COURT’S DENIAL OF JODY BORING’S
 CONTINUANCE REQUEST DENY JODY BORING DUE
 PROCESS OF LAW?.....10

CONCLUSION.....13

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Acevedo, 159 Wash.App. 221, 248 P.3d 526 (2010).....6

State v. Cadena, 74 Wash.2d 185, 188-89, 443 P.2d 826 91968).....11, 12

State v. Christensen, 100 Wash.App. 534, 536, 997 P.2d 1010, 1012.....8

State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).....10

State v. Downing 151 Wash.2d 265, 273, 87 P.3d 1169, 1173 (2004)....11, 12

State v. Edelman, 97 Wash.App. 161, 166, 984 P.2d 421 (1999).....8

State v. Eller, 84 Wash .2d 90, 95, 524 P.2d 242 (1974).....11, 12

State v. Griffith, 164 Wash.2d272, 285, 119 P.3d 350 (2005).....3, 4

State v. Hiett, 154 Wn.2d, 560, 115 P.3d, 274 (2005).....8

State v. Hurd, 127 Wash.2d 592, 594, 902 P.2d 651 (1995); Skagit Ry.
& Lumber Co. v. Cole, 2 Wash. 57, 62, 65, 25 P. 1077 (1891).....10

Ingram v. Dep’t of Licensing, 162 Wash.2d 514, 522, 173 P.3d 259 (2007)...3

State v. Kinneman, 155 Wash.2d 272, 285, 119 P.3d 350 (2005).....4, 5

State v. Kisor (1993) 68 Wash.App. 610, 844 P.2d 1038, review denied
121 Wash 2.d 1023, 854 P.2d 1084. See also State v. Pollard (1992) 66
Wash.App. 779, 834 P.2d 51, review denied 120 Wash.2d 1015,
844 P.2d 436.....3,9, 10

State v. Lohr, 130 Wash.App. 904, 910, 125 P.3d 977, 980 (2005).....5

State v. Mead, 67 Wash.App. 486, 490, 836 P.2d 257 (1992).....3, 8

State v. Miles, 77 Wash.2d 593, 597, 464 P.2d 723 (1970).....10

State ex rel. Nugent v. Lewis, 21 Wash.App. 779, 781, 586 P.2d 500 (1978)..11

Skagit Ry. & Lumber Co. v. Cole, 2 Wash. 57, 62, 65, 25 p. 1077 (1891).....10

SUPREME COURT

Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964).....11, 12

Chambers v. Maroney, 399 U.S. 42, 53-54, 90 S.Ct. 1975, 1982-1983, 26
L.Ed.2d 419, 429-30 (1970).....11

WASHINGTON STATUTES

RCW 9.94A.750(3).....2, 3

RCW9.94A.753.....4, 8

RCW 9A.08.010(c).....7

RCW 10.46.080; CrR 3.3(f).....11.

I.

ASSIGNMENTS OF ERROR

1. That the trial court erred as a matter of law in concluding that Jody Boring was jointly and severally liable for restitution to Hewes Craft with Chris Boring.
2. That the trial court erred as a matter of law in concluding that Jody Boring caused all of Hewes Craft's losses.
3. That the Trial Court abused its discretion in imposing restitution against Jody Boring in the amount of \$550,433.00
4. That the Trial Court violated Jody Boring's right to due process of law when it refused to grant her a continuance to investigate evidence of other thefts from Hewes Craft that contributed to its losses, as well as Hewes Craft's methodology in calculating its restitution request.

II.

ISSUES PRESENTED

1. Is there a basis to order restitution against Jody Boring for Damages to Hewes Craft Marine, including Damages allegedly caused by Christopher Boring?

2. Is there a causal relationship between the Jody Boring's conviction for Trafficking in Stolen property and the victim's losses that justify a restitution order based upon the value of all the victim's losses related to this offense?
3. Did the Trial Court's denial of Jody Boring's Continuance Request deny Jody Boring Due Process of Law?

III.

STATEMENT OF THE CASE

The State accepts the Appellant's Statement of the Case, only to the exclusion of personal attacks on counsel and subjective characterizations.

IV.

ARGUMENT

- A. WHAT IS THE BASIS FOR ORDERING RESTITUTION FOR THE TOTAL SUM OF DAMAGES TO HEWES CRAFT, INCLUDING DAMAGES CAUSED BY CHRISTOPHER BORING?

STATUTORY BASIS:

Restitution is generally a creature of statutory authority, derived from RCW 9.94A.750(3), which provides: "Except as provided in subsection (6) of this section, restitution 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 offense.” RCW 9.94A.750(3).

STANDARD OF REVIEW:

“The size of [a restitution] award is within the court's discretion and will not be disturbed on appeal absent a showing of abuse.” *State v. Mead*, 67 Wash.App. 486, 490, 836 P.2d 257 (1992) (citing *State v. Davison*, 116 Wash.2d 917, 919–20, 809 P.2d 1374 (1991)). We review a trial court's factual findings for substantial evidence. *Ingram v. Dep't of Licensing*, 162 Wash.2d 514, 522, 173 P.3d 259 (2007). Trial court has discretion to determine amount of restitution; that discretion is abused only where its exercise is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State v. Kisor* (1993) 68 Wash.App. 610, 844 P.2d 1038, review denied 121 Wash.2d 1023, 854 P.2d 1084. see also: *State v. Pollard* (1992) 66 Wash.App. 779, 834 P.2d 51, review denied 120 Wash.2d 1015, 844 P.2d 436.

CASE LAW AND ANALYSIS

A court's authority to impose restitution is statutory. *Davison*, 116 Wash.2d at 919, 809 P.2d 1374. A judge must order restitution whenever a defendant is convicted of an offense which results in loss of property. RCW 9.94A.753(5). The amount of restitution must be based “on easily ascertainable damages.” RCW 9.94A.753(3). While the claimed loss “need not be established with specific accuracy,” it must be

supported by “substantial credible evidence.” *State v. Fleming*, 75 Wash.App. 270, 274–75, 877 P.2d 243 (1994). “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. Hughes*, 154 Wash.2d 118, 154, 110 P.3d 192 (2005) (internal quotation marks omitted) (quoting *Fleming*, 75 Wash.App. at 274–75, 877 P.2d 243), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence. *State v. Kinneman*, 155 Wash.2d 272, 285, 119 P.3d 350 (2005).

Although there is no right to a jury determination of facts supporting the amount of restitution, “[r]estitution is allowed only for losses that are ‘causally connected’ to the crimes charged,” *State v. Tobin*, 161 Wash.2d 517, 524, 166 P.3d 1167 (2007) (quoting *Kinneman*, 155 Wash.2d at 286, 119 P.3d 350) unless the defendant “ ‘expressly agrees to pay restitution for crimes for which [she] was not convicted.’ ” *State v. Woods*, 90 Wash.App. 904, 908, 953 P.2d 834 (1998) (quoting *State v. Johnson*, 69 Wash.App. 189, 191, 847 P.2d 960 (1993)). Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. *Tobin*, 161 Wash.2d at 524, 166 P.3d 1167. “In determining whether a causal connection exists, **we look to the underlying facts of the charged offense, not the name of the crime to which the defendant entered a plea.**” *State v. Landrum*, 66 Wash.App. 791, 799, 832 P.2d 1359 (1992). ... A court can, in its discretion, order restitution up to double the amount of the victim's loss. RCW 9.94A.753(3). --*State v. Griffith*, 164 Wash.2d 960, 965-966, 195 P.3d 506, 508-509 (2008)(emphasis added).

“RCW 9.94A.753 precludes restitution for speculative and intangible losses.” *State v. Kinneman*, 155 Wash.2d 272, 285, 119 P.3d 350 (2005).

“However, while restitution must be based on ‘easily ascertainable damages,’ the ‘amount of harm or loss’ ‘need not be established with specific accuracy.’ ” *Id.* (quoting *State v. Hughes*, 154 Wash.2d 118, 154, 110 P.3d 192 (2005) (quoting *State v. Fleming*, 75 Wash.App. 270, 274, 877 P.2d 243 (1994))). **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. *Kinneman*, 155 Wash.2d at 285, 119 P.3d 350.” State v. Lohr 130 Wash.App. 904, 910, 125 P.3d 977, 980 (2005).

Appellant argues that she was convicted of a crime of Trafficking in Stolen Property in the Second Degree, and apparently argues that this is a complete bar to the award of restitution, due to the mental state associated with the offense. As shown above, restitution is a separate beast from the strict statutory language of the offense of conviction, but rather, a determination made by the Trial Court taking all of the underlying facts into consideration in the totality of the circumstances. As the case law shows above, the reviewing court looks to see if there is substantial evidence of a causal connection between the crime and the damages. Whether the defendant intended the crime, or intended the consequences are wholly irrelevant to the issue of restitution, the only issues are 1) whether there is a causal connection between the crime (and the circumstances/actions surrounding the commission of said crime) and the damages resulting therefrom, and 2) whether the damages have been reasonably ascertained..

B. IS THERE A CAUSAL RELATIONSHIP BETWEEN JODY BORING’S CONVICTION FOR TRAFFICKING IN STOLEN PROPERTY AND THE VICTIM’S LOSSES THAT JUSTIFY A RESTITUTION ORDER BASED UPON THE VALUE OF ALL THE VICTIMS LOSSES RELATED TO THIS OFFENSE?

The State will break this issue down into two areas of discussion. The first area of discussion is whether or not there is a causal connection between Trafficking in Stolen Property in the present case, and the damages sought. The Second area of discussion is whether or not the Appellant is responsible for the entirety of the damages she caused as part of a greater scheme, in which she was an accomplice.

CAUSALITY:

State v. Acevedo, 159 Wash.App. 221, 248 P.3d 526 (2010) is a decent example of the causal connection necessary to order restitution. In *Acevedo*, the defendant was found guilty of possession of a stolen motor vehicle, the vehicle had been stripped and partially scrapped when it was recovered in the defendant's possession. The Court ruled:

The Acura, then, was stripped before Mr. Acevedo bought it. No evidence shows or suggests that Mr. Acevedo stole the car or possessed the car since it was stolen or when it was damaged. Accordingly, no evidence shows that the Acura would not be stripped "but for" Mr. Acevedo's possession of it. The State, then, failed to show a causal connection between Mr. Acevedo's crime and the damage to Mr. Wold's Acura

-- *Acevedo*, at 231

What we have in the present case is a substantial showing of the possession of stolen property, followed by the destruction of the stolen property by recycling it. It is the disposing of this property in a manner that is essentially unrecoverable that “causes” the damages in the present case.

ACCOMPLICE LIABILITY AND RESTITUTION

While the Appellant argues that the jury verdict is an “implicit” statement that the appellant did not act with knowledge, the Jury Instructions do not support that conclusion. RCW 9A.08.010(c), as well as Jury Instruction 14A, clerks papers #44 at page 18, define reckless/recklessly the following way:

“A person is reckless or acts recklessly when he or she **knows of and disregards a substantial risk that a wrongful act may** occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation. When recklessness is required to establish an element of the crime, the element is also established if a person acts intentionally or knowingly as to that fact.” Clerks Papers #44(emphasis added). See also, RCW 9A.08.010(c).

While Appellant argues that the mental state of Trafficking in Stolen Property in the Second Degree is “reckless/recklessly,” to the exclusion of “knowingly”, that simply is not the case. The jury instructions go on to talk about the alternatives, and if there is a disagreement between which of two degrees of an offense have been committed, the jury can only convict of the lesser degree. Appellant’s argument simply distorts these definitions to meet her

objective by asserting an over technical construction of the meaning and intent of the restitution statute. Statutes authorizing restitution should not be given an overly technical construction which would permit the defendant to escape from just punishment. *State v. Christensen*, 100 Wash.App. 534, 536, 997 P.2d 1010, 1012, citing *Davison*, 116 Wash.2d at 922, 809 P.2d 1374. A policy further proclaimed by stating the purpose of restitution: “[U]nder the sentencing reform act, restitution is part of an offender's sentence and is primarily punitive in nature.” *State v. Edelman*, 97 Wash.App. 161, 166, 984 P.2d 421 (1999). Nonetheless, restitution also “has a strong compensatory purpose” to provide reparation to victims. *Id.*; *State v. Mead*, 67 Wash.App. 486, 490, 836 P.2d 257 (1992).

In *State v. Hiett*, 154 Wn.2d 560, 115 P.3d 274 (2005) two passengers who had been convicted of taking a motor vehicle challenged the trial court's restitution order holding them jointly and severally liable for all damages incurred as a result of the crime. They argued that they were liable only for the damage they actually caused while committing the crime. *Hiett*, 154 Wn.2d at 562. Our Supreme Court held that the relevant causal connection was between the damage and the committed offense, not merely between the damage and each participant's individual conduct while committing the offense. *Hiett*, 154 Wn.2d at 564. Thus, all defendants convicted of the crime were jointly and severally responsible for the restitution. the trial court's discretion not to order restitution is limited. RCW 9.94A.753(5) provides that “[r]estitution *shall* be

ordered ... *unless extraordinary circumstances exist* which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record.” (Emphasis added.) The Division 1 Court in *Keigan C.* stated that restitution may not be ordered only when “the damage incurred is so remote from the participation of a passenger that it is not causally connected to the crime charged against the passenger.” *Keigan C.*, 120 Wn.App. at 609.

Here, the actions of Ms. Boring were as an accomplice to the greater scheme or plan of Mr. Boring. Appellant agrees that numerous signatures of both Ms. Boring and Mr. Boring are found on the receipts for the recycling center. Appellant agrees that she would take the metal to the recycling center at the request of Mr. Boring. Appellant agrees that both Mr. and Ms. Boring were recognized by Action Recycle as representatives of the same company, Bella Boats. This action, in this quantity, is clear and convincing evidence that the two were in cahoots. It can not be said, however, that Ms. Borings actions were so remote from the participation of Mr. Boring that she should not be held responsible for the entirety.

The determination of remoteness is a factual determination, relating to the appropriate amount of restitution to be awarded. Trial court has discretion to determine amount of restitution; that discretion is abused only where its exercise is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State v. Kisor* (1993) 68 Wash.App. 610, 844 P.2d 1038, review denied 121 Wash.2d 1023, 854 P.2d 1084. see also: *State v. Pollard* (1992) 66

Wash.App. 779, 834 P.2d 51, review denied 120 Wash.2d 1015, 844 P.2d 436.

Here, the connection between the two, often going to the recycling center together, shows the conspiracy, or accomplice liability of each of them.

C. DID THE TRIAL COURT'S DENIAL OF JODY BORING'S CONTINUANCE REQUEST DENY JODY BORING DUE PROCESS OF LAW?

STANDARD OF REVIEW

In both criminal and civil cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. State v. Miles, 77 Wash.2d 593, 597, 464 P.2d 723 (1970). Since 1891, this court has reviewed trial court decisions to grant or deny motions for continuances under an abuse of discretion standard. State v. Hurd, 127 Wash.2d 592, 594, 902 P.2d 651 (1995); Skagit Ry. & Lumber Co. v. Cole, 2 Wash. 57, 62, 65, 25 P. 1077 (1891). We will not disturb the trial court's decision unless the appellant or petitioner makes "a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971) (citing MacKay v. MacKay, 55 Wash.2d 344, 347 P.2d 1062 (1959)). In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process,

materiality, and maintenance of orderly procedure. State v. Eller, 84 Wash.2d 90, 95, 524 P.2d 242 (1974); RCW 10.46.080; CrR 3.3(f).

“Motions for continuance are addressed to the sound discretion of the trial court and there is no mechanical Fifth Amendment test for deciding when a denial of a continuance violates due process. Each case must be judged according to its own circumstances. Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); State v. Cadena, 74 Wash.2d 185, 188-89, 443 P.2d 826 (1968); State v. Eller, 84 Wash.2d 90, 95-96, 524 P.2d 242 (1974); State ex rel. Nugent v. Lewis, 21 Wash.App. 779, 781, 586 P.2d 500 (1978); RCW 10.46.080. Likewise, there is no mechanical Sixth Amendment test regarding what constitutes a reasonable time to prepare a case; each case must be examined individually to determine whether the defendant has been given sufficient time for effective legal representation. See Chambers v. Maroney, 399 U.S. 42, 53-54, 90 S.Ct. 1975, 1982-1983, 26 L.Ed.2d 419, 429-30 (1970).”
State v. Downing 151 Wash.2d 265, 273, 87 P.3d 1169, 1173 (2004).

ARGUMENT

The Supreme Court has “previously recognized “that failure to grant a continuance may deprive a defendant of a fair trial and due process of law, within the circumstances of a particular case.” Williams, 84 Wash.2d at 855, 529 P.2d 1088 (citing State v. Cadena, 74 Wash.2d 185, 443 P.2d 826 (1968)).
Additionally, a denial of a request for a continuance may violate a defendant's

right to compulsory process if the denial prevents the defendant from presenting a witness **material** to his defense. Eller, 84 Wash.2d at 95, 524 P.2d 242.

Whether the denial of a continuance rises to the level of a constitutional violation requires a case by case inquiry. Id. at 96, 524 P.2d 242 (citing Cadena, 74 Wash.2d 185, 443 P.2d 826); (Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)).” State v. Downing 151 Wash.2d 265, 274-5, 87 P.3d 1169, 1173-4 (2004) (emphasis added).

In the present case, the Appellant sought a continuance to obtain evidence that other people had stolen metal from Hewes Craft Marine. Appellant mischaracterizes the methodology of proof used by the state in proffering the total sums of damages to Hewes Craft Marine. A review of the record, in its totality, shows that the sums of damages were directly related back to the receipts signed by the Borings at Action Recycle. The Sums of the 5052 metal were then tabulated into a spreadsheet, and broken down by year. Those years costs for metal to Hewes Craft were used, as well as the average scrap costs, coming to three different scenarios, a) 55%of the recycled metal being raw material/ 45% being scrap metal, b) 70% of the recycled metal being raw material/ 30%being scrap metal, and c) 90% of the recycled metal being raw material/ 10% being scrap metal.

It is true, the State relied on the calculations of the Hewes Craft CFO to determine the value of the losses to Hewes Craft. It is false to say, as Appellant wants the court to believe, that the reported losses of all scrap and sheet metal

missing from inventory at Hewes Craft was attributed to the Borings. Frankly, the exhibits show a discrepancy, consistently, in which the amount of missing material overall was greater than the metal accounted for on the Receipts from Action Recycle. While Appellant argues the State made a misrepresentation to the Court, and used the total amount of metal missing from inventory in its value calculation, that simply is not the case, as the exhibits and record show, through a careful reading in its entirety.

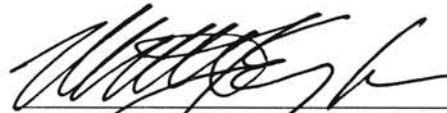
Because the State relied solely on the quantities of metal recycled by the Borings, as documented by the receipts bearing their signatures, proof of other persons stealing from Hewes Craft Marine would be completely immaterial to the issue of restitution.

Since the evidence Ms. Boring sought to obtain was wholly irrelevant and immaterial, due to the methodology used to account for the value of the damages to Hewes Craft Marine, there can be no finding of abuse of discretion of the court. This court ought uphold the Trial Courts ruling, as being proper, or at least not being an abuse of discretion.

CONCLUSION

Based upon the legal arguments and facts above, the State requests that the ordered restitution be affirmed in this case.

Dated this 5th day of July, 2012.



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Deputy Prosecuting Attorney
Stevens County Prosecuting Attorney's Office
Attorney for Respondent

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Respondent's Brief to the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201, and mailed to Ms. Andrea Burkhardt, Burkhardt & Burkhardt, PLLC, PO Box 946, Walla Walla, WA 99362 and to Ms. Jodi Danielle Boring, PO Box 939, Kettle Falls, WA 99141.

Signed this _____ day of July, 2012 in Colville, WA.



Michele Lembcke, Legal Assistant to
Mathew J. Enzler