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Court of Appeals No. 31636-6-II

CLERK OF SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

DOUGLAS JOHN TOBIN,

Defendant.

PETITION FOR REVIEW

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ORIGINAL

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I. Identity of Petitioner

Petitioner Douglas John Tobin asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this Petition.

II. Court of Appeals Decision

Mr. Tobin seeks review of the Opinion filed by Division II of the Court of Appeals on March 21, 2006.

A copy of the Opinion is in the Appendix at pages A-1 through A-27.

III. Issues Presented for Review

1. The Court of Appeals erred in upholding a restitution order where the State's expert used estimates of between 21 and 25 per cent to calculate his damage awards amounts, resulting in an award based on conjecture and speculation.

2. The Court of Appeals erred in awarding the State its investigative and administrative costs because such costs were not sufficiently related to the crimes to which Mr. Tobin plead guilty

3. The Court of Appeals erred in finding upholding restitution based on legally insufficient Declarations which failed to meet the mandatory requirements of RCW 9A.72.085.

IV. Statement of the Case

Douglas John Tobin plead guilty on April 25, 2003 in Pierce County Superior Court Cause No. 02-1-01236-3 to 35 fish and wildlife

felonies and 2 gross misdemeanor concerning the unlawful taking of crab during specified days during the time period of June 2000 through September 2000 and March 2001 through April 2001, and the time period of November 11, 2001, February 5, 2002, January 1 to March 15, 2002 in Pierce County Superior Court Cause No. 02-1-05810-0 to 1 count of theft in the first degree for illegal geoduck harvesting during the time period of January 2000 to March 2002. CP 24, 26-30, 158-174, 175,176-191. No appeal was taken from the sentences imposed on December 15, 2004. CP 195-208, 209-214, 36-38, 42-52. A combined restitution hearing was held on April 9, 2005. The court considered declarations filed by the State for Kevin Harrington (CP 53-69, 116-118), Wayne Palsson (CP 79-82), Bob Sizemore (CP 83-90), Edward Volz (CP 119-127), William Omais (CP 91-115) and The State's memorandum. CP 70-74. The Court also considered defense memorandums and declarations for Jeff Albulet. CP 215-224, 228-229,230-232. Also filed with the court was a memorandum from the Squaxin tribe, one of the victims in this case. CP 245-254. The Court heard argument from the parties, however, no testimony was taken and the court determined the amount of the award based solely on the documents filed and the arguments of counsel, after which the court ordered restitution in the amount of \$ 879, 408.40 for the poached geoduck and in the amount of \$247,803.00 for the poached crab. CP 77-

78, 243-244. The Court adopted Omait's calculations and found the loss to the State was \$764,408 representing the bid price for geoduck and \$198,000 for crab representing a wholesale value of \$3.00 per pound. RP 28-29. The court also included an award for special damages for the State's investigative and clerical costs. RP 37.

Appeals were timely filed on both matters on April 13, 2004 and were consolidated on review under Court of Appeals No. 31636-6-II. CP 128-130, 255-260.

On appeal, *inter alia*, Tobin argued that under well established State Supreme and Court of Appeals case law, restitution must be readily ascertainable and cannot be based on speculation or conjecture. Tobin also argued that the statutorily mandated requirements for a valid declaration were not met and the trial court erred in relying on the State's declarations.

The Court of Appeals ruled that restitution based on estimates ranging from 21 to 25 per cent was sufficiently reliable. The Court declined to follow this court's decision in In re Marriage of Muhammed, 153 Wn.2d 795, 108 P.3d 779 (2005) in which this court found a marriage award based on an estimate of 21 per cent rendered the award too speculative and conjectural.

Tobin also argued that the declarations submitted by the state failed to meet the minimum requirements of RCW 9A.72.085. The Court of Appeals ruled (1) that Tobin waived any objection to the statutorily deficient declarations by not objecting below, (2) the rules of evidence do not apply at restitution hearings, and (3) that a “mere” technical defect in a declaration does not affect its admissibility at a restitution hearing.

V. Argument Why Review Should Be Accepted

Under RAP 13.4(b), this Court may accept discretionary review of a Court of Appeals decision terminating review only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or**
- (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or**
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or**
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.**

(Emphasis added.)

The Court of Appeals decision that restitution based on estimates ranging from 21 to 25 percent of estimated losses is not based on speculation or conjecture in conflict with the Washington Supreme

Court's decision State v. Smith, 119 Wn.2d 385, 388- 389, 831 P.2d 1082 (1992) and RCW 9.94A.753. The Court of Appeals decision upholding an award of restitution for State investigation costs not proven to be causally connected to the crime is in conflict with Washington Supreme Court decision State v. Enstone, 137 Wn2d. 675, 974 P.2d 828 (1999) and RCW 9.94A.753. The issue of whether or not the court may consider legally insufficient declarations as proof of restitution where a defendant contests the amounts claimed is in conflict with RCW 9A.72.085 and the 14th Amendment due process rights of defendants.

These issues are also issues of substantial public interest.

1. The Court Erred In Ordering Restitution In The Amounts Requested By The State Because Such Amounts Were Not Ascertained With Reasonable Certainty.

The authority to order restitution is purely statutory. State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). The amount of restitution an offender must pay must 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.' Former RCW 9.94A.142(1)(2000) (recodified in 2001 as RCW 9.94A.753(3). Id. at 388-89. 'Easily ascertainable' damages are those tangible damages proven by sufficient evidence to exist. State v. Bush, 34

Wn. App. 121, 123, 659 P.2d 1127, review denied, 99 Wn.2d 1017 (1983). Evidence is sufficient if it provides a reasonable basis for estimating the loss and does not subject the trier of fact to speculation or conjecture. State v. Awawdeh, 72 Wn. App. 373, 379, 864 P.2d 965, 969, review denied, 124 Wn.2d 1004, 877 P.2d 1288, cert. denied, 513 U.S. 970, 115 S.Ct. 441, 130 L.Ed.2d 352 (1994); Bush, 34 Wn. App. at 123. Where the amount of restitution is not agreed to, the State must establish the amount by a preponderance of the evidence. The award must be based on a causal relationship between the offense and the victim's losses or damages. State v. Johnson, 69 Wn. App. 189, 191, 87 P.2d 950 (1993).

Although the Rules of Evidence do not apply at restitution hearings, (ER 1101(c)) the evidence supporting restitution must be reasonably reliable, and the defendant must be given an opportunity to refute it. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). If a restitution order is set aside on appeal because of an insufficient factual basis, additional evidence cannot be introduced on remand, because that would result in restitution set outside the 180-day period. State v. Dennis, 101 Wn. App. 223, 228-30, 6 P.3d 1173, 1176 (2000).

If a defendant pleads guilty to a lesser offense or fewer offenses, the defendant may agree to pay restitution for offenses that were not prosecuted pursuant to the plea agreement. RCW 9.94A.753(5); see State

v. Lee, 132 Wn.2d 498, 505, 939 P.2d 1223 (1997). Absent such an agreement, restitution can only be imposed for damages resulting from the specific crime of which the defendant was convicted. For example, if the defendant defrauds a number of different people, restitution can only be awarded to the victims named in the information. State v. Eilts, 94 Wn.2d 489, 617 P.2d 993 (1980). When a series of thefts is committed against the same victim, restitution can only be imposed for the specific theft that the defendant was convicted of. State v. Miszak, 69 Wn. App. 426, 848 P.2d 1329 (1993); State v. Raleigh, 50 Wn. App. 248, 748 P.2d 267 (1988).

While the Court of Appeals correctly cites the standards for restitution it fails to apply them to the facts of this case, resulting in an award of restitution that is contrary to decisional and statutory law. Here, Tobin timely disputed the accuracy of the claimed of damages. Cf State v. Harrington, 56 Wn. App. 176, 181,782 P.2d 1101 (1989) (argument that amount of restitution exceeded fair market value of car waived when raised for first time on appeal).

The court's reliance on the estimate of damages provided by Mr. Omaitis for the State was not sufficiently accurate to establish the loss to the State. Omaitis was asked to provide an estimate of crab and geoduck taken during the time period between January 2000 and March 18, 2002

by Doug Tobin and Toulok. Sources relied upon were air freight bills invoices, other sales records and witness statements. Dec. p. 2. A full twenty-five percent of the total pounds of claimed State losses for stolen geoduck was “estimated”. Dec. pg. 3¹. With respect to claimed crab losses, Omaitis estimated a full twenty-one per cent of the state’s claimed losses.² Dec. p. 3-4. Once the fact of damage is established, the amount need not be shown with mathematical certainty, State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984), however it must not be based on mere conjecture or speculation. State v. Awawdeh, 72 Wn. App. at 379; Bush, 34 Wn. App. at 123. As this Court recently held, 21% is not de minimus and ordered remand in a marital property distribution. In re the Marriage of Muhammad, 153 Wn.2d 795, 108 P.3 779 (2005) (classified of 21% of pension accrued meretricious relationship as minimal is “inexplicable”). Likewise, estimates of 21 to 25% are too significant to support an award and as such render the award speculative and conjectural.

The Court of Appeals erred in finding that estimates used by the State’s expert had a reasonable basis, despite the State’s concession in its opening brief and during oral argument that damages could not be

¹ “The number of estimated sales invoices used to determine the total pounds and dollar value of stolen Geoduck is 25% of the total.” Omaitis Dec. p. 3. CP 93.

accurately determined. Moreover, the Court of Appeals erred in rejecting this court's discussion in Muhammad regarding the sufficiency of evidence in establishing an award. While Muhammad involves the distribution of marital assets, this court determined that awards in which 21% of the assets are discounted is not reasonable. Likewise, here an award in which the court must rely on loss estimates ranging from 21 to 25% is not reasonable and is an abuse of discretion. This estimation problem is not overcome by the State's expert's claim that he was being "conservative" or was being careful, the bottom line is his award calculations are unreasonably speculative and rely on conjecture. In this manner, this case is similar to State v. Kisor, 68 Wn. App. 610, 620-621 844 P.2d 1038 (1993) 99 Wn. App. 251, 256-57, 991 P.2d 1216 (Div. 1 2000) in which the court rejected the State's expert's affidavit that relied on hearsay evidence to provide a "rough estimate" as not being substantial credible evidence. Moreover, the Kisor court held, "Due process was offended by the trial court's reliance upon the State's affidavit and we thus reverse the restitution order and remand for a new restitution hearing." Id.

Although the setting of restitution is an integral part of sentencing, the rules of evidence do not apply at restitution hearings. State v. Pollard, 66 Wn.App. at 779, 784, 834 P.2d 51 (1992). Evidence presented at

² "The total number of estimated calculations used to determine the total pounds and

restitution hearings, however, must meet due process requirements, such as providing the defendant with an opportunity to refute the evidence presented, and being reasonably reliable. Pollard, 66 Wn.App. 784-85, 834 P.2d 51 (citing State v. Strauss, 119 Wn.2d 401, 418, 832 P.2d 78 (1992)). In other words, the amount of restitution must be established with "substantial credible evidence" which "does not subject the trier of fact to mere speculation or conjecture." (Citations omitted.) State v. Fambrough, 66 Wn.App. 223, 225, 831 P.2d 789 (1992). When the evidence is comprised of hearsay statements, the degree of corroboration required by due process is not proof of the truth of the hearsay statements "beyond a reasonable doubt", but rather, proof which gives the defendant a sufficient basis for rebuttal. State v. S.S., 67 Wn.App. 800, 807-808, 840 P.2d 891 (1992).

Likewise, in State v. Hahn, 100 Wn. App. 391, 400, 996 P.2d 1125 (2000) the court reversed a restitution award based on a listing of medical services that accounted for only \$3,921.52 of a claimed \$24,662.37. The court held that evidence of damages is sufficient if it requires no speculation or conjecture. Hahn at 398-99.

Not only did Omaid's award calculation embrace a guesstimated of losses ranging from 21 to 25%, Omaid's did not distinguish between

dollar amount of poached Crab is 21%." Omaid's Dec. p. 4. CP 94.

lawfully harvested and stolen shellfish that was shipped via air freight; he simply concluded that all air freight shipments of shellfish for which he could not find other sales documentation was stolen. Omaitis Dec. p. 2-3. CP 91-94. As described in the declaration of Jeff Albulet (CP 30-232) Clearbay had Toulok ship via air freight legally harvested shellfish brought to Toulok by other harvesters. Thus losses calculated via air freight bills were not reasonably accurate to establish “easily ascertainable” damages either.

Similarly, the assumption that Clearbay would not ship product to Tobin is not supported by the record. CP 230-232. As stated in the Albulet Declaration – “On occasion, for various reasons, Clearbay Fisheries would send geoducks product to Seattle over the Canadian border to the Toulock [Tobin] plant for shipment to customers in various parts of the United States.” Thus, the Harrington Declaration Ex. 6 p. 3.³ (CP 53-69) in which he surmises there would be no reason for Clearbay to ship from Toulock is without out factual basis and calculations based on this assumption are not appropriate.

³ “In all my experience investigating the geoducks industry, including extensive work examining airline records, I am not aware of a single instance of a Canadian company transporting geoducks harvested in Canada to Sea/Tac airport.”

As pointed out by Tobin, Mr. Omais's calculations were also based on information obtained from Jack Li. Li was a middleman – he purchased seafood product and then resold it to others. Mr. Li, while facing his own criminal charges, fled, however, not before he allegedly told State investigators he purchased all his geoduck from Tobin's seafood processing plant. Harrington Dec p.3. CP116-118. Consequently, Mr. Omais estimated the amount of geoduck allegedly poached by Tobin based on the bank deposits made to Li by his purchasers. The problem with this accounting method is it does not take into account the fact that as a middle man he included a markup in his sales price. By calculating the geoduck poundage from these deposits Omais's approach overestimates the amount of geoduck because it calculates the poundage based on deposits that include a markup. Therefore, even if all the geoducks purchased by Li were obtained from Tobin the numbers relied on by Omais to establish the amount is inaccurate because it includes Li's markup. Moreover, it includes legally purchased product and product sold from Tobin's processing plant that came from other divers using Tobin's boat, the Typhoon, as a dive platform. At least 19 Indian divers used the Typhoon and the defendant indicated in his materials that he believed Li was buying from other divers as well as from Tobin. Squaxin Tribe Memo. P. 9-10. CP 245-254.

Tobin also challenged the information in the Harrington declaration indicating he was told by a Mr. Chau that Chau was told by Li that he purchased his geoduck from Tobin. Mr. Chau has never met Tobin and lacks reliable knowledge of where Li's geoducks came from. Significantly, Li's statements should not be taken at face value because of his personal motive to shift blame and curry favor with the government in the hopes of avoiding or lessening his own potential punishment for his own crimes. Consequently, even though the rules of evidence do not apply at restitution hearings, the evidence must be sufficiently reliable for the court to calculate the loss to the victim. Because the State relied on unsupported and unreliable evidence it failed to muster sufficient evidence supporting its claimed losses. Thus, as in Kisor, supra, in which the court rejected an award based on unreliable hearsay, and in Hahn, supra, in which a court rejected an award based on conjecture and speculation, this court should reverse the Court of Appeals decision permitting an award based on unreliable hearsay and speculation found in Omit's declaration.

Accordingly, the estimate of damages relied on by the court and approved by the court of appeals is in error because it is based on both speculation and conjecture.

Issue No 2: The Court Erred In Awarding The State Its Investigative And Administrative Costs Because Such Costs

Were Not Sufficiently Related To The Crimes To Which Mr. Tobin Plead Guilty.

The State tendered the Declaration of Edward Volz in support of claimed investigative costs. This Declaration is insufficient as a matter of law. The requirements for a valid declaration are few but are necessary. As described below, the Declaration must contain both the date and place of execution. Here the place of execution is lacking. Thus the court should not consider this declaration in support of the request for investigative and administrative costs.

Moreover, the claimed costs are not proper because they are not substantiated with reasonable accuracy and because they are not sufficiently tied to the crimes to which Tobin plead guilty. Restitution is appropriate whenever there is a causal connection between the defendant's crimes and the injuries. State v. Enstone, 137 Wn.2d 675, 974 P.2d 828 (1999); State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 12 16 (2000).

As held in State v. Dedonado, 99 Wn.App. 251 at 256-257:

A causal connection is not established simply because a victim or insurer submits proof of expenditures for replacing property stolen or damaged by the person convicted. Such expenditures may be for items of substantially greater or lesser value than the actual loss. ... Similarly, it is not possible to determine from the documentation provided by the State whether all of the repairs to the van were related to the damaged ignition switch. The

State did not meet its burden of proving the restitution amounts here by a preponderance of the evidence because the documentation it provided did not establish a causal connection between Dedonado's actions and the damages. See Woods, 90 Wn.App. at 907, 953 P.2d 834; RCW 9.94A.370(2).

Such is our case. As discussed above, the amount of restitution an offender must pay must 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.' Former RCW 9.94A.142(1) (2000) (recodified in 2001 as RCW 9.94A.753(3)). 'Easily ascertainable' damages are those tangible damages proven by sufficient evidence to exist. State v. Bush, 34 Wn. App. at, 123. Evidence is sufficient if it provides a reasonable basis for estimating the loss and does not subject the trier of fact to speculation or conjecture. State v. Awawdeh, 72 Wn. App. at 379; Bush, 34 Wn. App. at 123. There is no requirement that the damages be foreseeable. Id. The trial court does have discretion to refuse to order restitution when the injuries are only remotely related to the crime. State v. Enstone; State v. Coe, 86 Wn. App. 841, 843, 939 P.2d 715 (1997); State v. Kisor, 82 Wn. App. at 180.

It was error for the court to include investigative, staff support costs, and survey costs as special damages for the restitution for the geoduck offense because the State did not prove the costs and because the costs were not sufficiently related to Mr. Tobin's actions.

As described by Mr. Volz at page 8 of his Declaration (CP 119-127) he guesstimated that two Fish and Wildlife detectives spent **about** 75% of their time on the Tobin case, that another one spent **about** 60% of his time for 12 months on the case, and that yet another detective spent **about** 40% of his time for 18 months on the Tobin case and that two other detectives spent **about** 20% of their time in Tobin for 12 months. No where does Mr. Volz attach any supporting documentation, such as time sheets, pay stubs or similar corroborating information. As in State v. Hahn, 100 Wn. App. 391, 399-400, there must be a causal connection between the victim's expenses and the crime committed. This takes more than submitting a list of expenses that may or may not relate to the crime. Id. (Citing State v. Bunner, 86 Wn. App. 158, 160, 936 P.2d 419 (1997)). The costs included investigation in areas for which there is no evidence Mr. Tobin conducted illegal activities. Because the costs are not sufficiently supported and fail to establish the necessary nexus to the Tobin crimes, the award for special damages must be reversed.

Issue No 3: The Court of Appeals Erred In Refusing To Consider Whether The State Met Its Burden Of Proof Because Such Amounts Were Not Proven By Competent Evidence Because The Declarations Submitted In Support Of The Claimed Losses Failed To Meet The Statutory Requirements Of RCW 9A.72.085.

The Court of Appeals held that it would not consider Tobin's assigned error holding he had waived any objection to the declarations submitted by the State. The Court of Appeals reasoned the admission of evidence was in the discretion of the court and absent an objection it would not consider the issue. The Court of Appeals errs in this ruling because it impermissibly relieves the State from its burden of proof by competent evidence. As discussed in Dedonado, in reversing the trial court's shifting of the burden to the defendant to notify the State of its proof defects, the court held:

Restitution is an integral part of sentencing, and it is the State's obligation to establish the amount of restitution. State v. Burmaster, 96 Wn.App. 36, 51, 979 P.2d 442 (1999); Kisor, 68 Wn.App. at 620, 844 P.2d 1038 (citing State v. Pollard, 66 Wn.App. at 779, 784, 834 P.2d 51 (1992)). RCW 9.94A.142 does not require that a defendant notify the State that he or she is challenging written documentation so that the State can have the opportunity to summon a witness or to get additional documentation to address his or her concerns. RCW 9.94A.142. Similarly, RCW 9.94A.142 does not explicitly require that the State summon witnesses or get additional documentation to address a defendant's challenges. ... The sentencing court improperly imposed that requirement upon Dedonado and ordered restitution based upon evidence that did not establish a causal connection between Dedonado's actions and the damages. See Vinyard, 50 Wash.App. at 891, 751 P.2d 339.

Entry of the order was thus an abuse of discretion.

State v. Dedonado 99 Wash.App. 251, 256-257, 991 P.2d 1216,1219 -
1220 (Wn. App. Div. 1,2000)

A trial court may determine the amount of restitution “by either (1) the defendant’s admission or acknowledgement or (2) a preponderance of the evidence.” State v. Hahn, 100 Wn. App. at 399; State v. Enstone, 137 Wn.2d at 682. In addition to the substantive deficiencies in the declarations submitted (See arguments 1 and 2 above), the declarations fail to meet the basic statutory requirements for consideration by the court.

Concededly, restitution may be made by affidavit. The use of declarations in lieu of affidavits is authorized by statute:

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
 - (2) Is subscribed by the person;
 - (3) **States the date and place of its execution;** and
 - (4) States that it is so certified or declared under the laws of the state of Washington.
- ...

RCW 9A.72.085, in part.

Additionally, General Rule 13 provides in part as follows:

- (a) **Unsworn Statement Permitted.** Except as provided in section (b), whenever a matter is required or permitted to be supported or proved by affidavit, the matter may be supported or proved by an unsworn written statement, declaration, verification, or certificate executed in accordance with RCW 9A.75.085.

Even though the State was permitted to submit declarations in lieu of live testimony or sworn affidavits, the State tendered declarations that failed to meet the minimum the statutory requirements. None of the proffered declarations contain the *place* of execution, as such they are legally insufficient as a basis for an award of restitution.⁴ See CP 91-115 (Omaitis Declaration), 53-69, 116-118 (Harrington Declarations), 119-127 (Volz Declaration), 83-90 (Sizemore Declaration), 79-82 (Palsson Declaration). Cf. Veranth v. State, Dept. of Licensing, 91 Wn.App. 339, 341-343, 959 P.2d 128,129 (Wn.App. Div. 1,1998)(Use of abbreviation SPD N PCT for Seattle Police Department North Precinct for the place designation was a non-fatal technical flaw in light of other comprehensive references to the Seattle Police department and its location in Seattle

⁴ In Manius v. Boyd, 111 Wn. App. 764, 47 P.3d 145 (2000) the court limited its holding that the failure of an otherwise proper unsworn certificate of mailing in the context of the Mandatory Arbitration Rules to set out the place of mailing was not fatal.

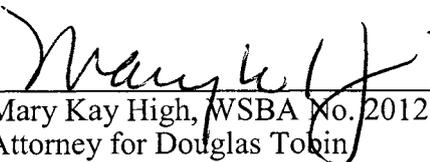
Washinton.) Here there is no cure for the defect and the court should have not considered the declarations and the Court of Appeals finding that it was a mere technicality is in conflict with the Veranth decision from Division 1.

VI. Conclusion

The State failed to tender legally sufficient declarations in support of its claimed losses and they must be disregarded. Moreover, the State's conceded it had to estimate 21% of the claimed crab losses and 25% of the claimed geoduck losses. Such an estimate is unacceptably speculative requiring the order of restitution be reversed. The Court also erred in awarding investigative and office costs because such costs were not proven to be sufficiently related to Mr. Tobin's actions.

DATED this 20th day of April, 2006.

Respectfully submitted,



Mary Kay High, WSBA No. 20123
Attorney for Douglas Tobin

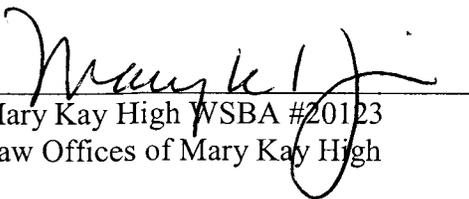
CERTIFICATE OF SERVICE

Mary Kay High hereby certifies under penalty of perjury under the laws of the State of Washington that on the 20th day of April, 2006, I delivered a true and correct copy of the Petition for Discretionary Review to which this certificate is attached to the following:

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Douglas Tobin
DOC# 253648
P.O. Box 900
Shelton, WA 98584

Signed at Tacoma, Washington this 20th day of April, 2006.


Mary Kay High WSBA #20123
Law Offices of Mary Kay High

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COURT OF APPEALS
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STATE OF WASHINGTON
BY 
IDENTITY

APPENDIX A



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

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CONSOLIDATED CASE #: 31636-6-II and 31646-3-II
State of Washington, Respondent v. Douglas John Martin Tobin, Appellant

Counsel:

An opinion was filed by the court today in the above case. A copy of the opinion is enclosed.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Ponzoha", with a long horizontal flourish extending to the right.

David C. Ponzoha
Court Clerk

DCP:cjb
Enclosure

cc: Judge John McCarthy
Indeterminate Sentence Review Board

FILED
COURT OF APPEALS
DIVISION II

06 MAR 21 AM 9:24

STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS JOHN MARTIN TOBIN,

Appellant.

No. 31636-6-II
(Consolidated with No. 31646-3-II)

PUBLISHED OPINION

ARMSTRONG, J. -- Douglas John Martin Tobin appeals the superior court's restitution order against him for stealing crab and geoducks from the State of Washington and Native American Tribes. He argues that (1) the declarations the expert used to estimate damages failed to meet the requirements of RCW 9A.75.085; (2) the expert did not assess damages with reasonable certainty; (3) the investigative and administrative costs the court included in the order were not sufficiently related to Tobin's criminal activity; and (4) the State had no interest in the geoducks and should not have been awarded restitution for them. We affirm, holding that Tobin waived any technical defect in the declarations; that the State proved damages with reasonable certainty; that the State was entitled to recover its investigative and administrative costs; and that the court properly awarded restitution to the State, to be allocated by agreement with the Native American Tribes.

FACTS

In 2002, authorities charged Douglas John Martin Tobin with leading organized crime; 10 counts of first degree trafficking in stolen property; 27 counts of first degree theft; and 1 count of first degree conspiracy to commit theft. These charges concerned the illegal harvest and sale of geoducks from January 2000 to March 2002 (the geoduck case¹).

Soon after, authorities charged Tobin by second amended information with 33 counts of first degree violation of commercial area or time; 33 counts of unlawful trafficking in fish or wildlife; one count of first degree engaging in fish dealing activity unlicensed; one count of first degree commercial fishing without a license; and 33 counts of failure to report commercial fish, shellfish harvest, or delivery. These charges concerned the illegal harvest and sale of crab from June 1, 2000, to February 5, 2002 (the crab case²).

Tobin pleaded guilty to first degree theft in the geoduck case. In exchange, the State dropped the remaining 38 counts and informed Tobin that it would seek an exceptional sentence and request \$1.2 million in restitution. Tobin also pleaded guilty to various charges in the crab case. The State advised him it would request an exceptional sentence and seek \$300,000 in restitution.

At the restitution hearing, the State sought restitution for 196,412 pounds of geoducks; \$15,000 for the expense of hiring an extra secretary half-time in order to manage the evidence; \$47,000 for the forensic accountant; and \$70,000 for the resurvey of the illegally harvested tracts. The State argued that these costs were a direct result of Tobin's actions. In the crab case,

¹ Superior Court Cause Number 02-1-05810-0.

² Superior Court Cause Number 02-1-01236-3.

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the State sought \$198,305.20 for 72,594 pounds of crab. The State also requested costs of \$42,000 for three patrol vessels that had to go out and look for crab pots that were on the bottom of the Puget Sound in the Nisqually area, and \$75,500 for the screen radon, which was used to locate the pots.

At the restitution hearing, the trial court heard arguments from the parties, but it took no testimony. Instead, it considered the State's memorandum regarding restitution, which included the declarations of (1) Detective Edward Volz of the Washington Department of Fish and Wildlife (WDFW); (2) Kevin Harrington, also a WDFW detective; (3) William Omaitis, a forensic accountant; (4) Bob Sizemore, a WDFW biologist; and (5) Wayne Palsson, a WDFW research scientist. The court also considered Tobin's memorandum and two supplemental memoranda on restitution, as well as a declaration response to the declaration of Ian Child, and a declaration from Jeff Abulet, co-owner of Clear Bay. Tobin did not object to the State's declarations.

The court adopted Omaitis's calculations and found that the loss to the State for the value of the geoducks was \$764,408.40. It also found that Tobin was responsible for \$198,305.20, the value that he received for the crab. And the court found the various investigation and administrative damages to be \$15,000, \$30,000, \$70,000, \$42,000, and \$7,500.

Accordingly, the court ordered \$879,408.40 in restitution in the geoduck case, with the funds to be distributed to the State, to be allocated by agreement among the State and the Nisqually, Squaxin, and Puyallup Indian Tribes. The court ordered \$247,803 in restitution in the crab case, with the funds to be allocated by agreement between the State and the Nisqually Indian Tribe.

We have consolidated the cases on appeal.

I. The Geoduck Case

Tobin ran a fishing organization that illegally harvested geoduck clams belonging to the State of Washington and the Puyallup, Nisqually, and Squaxin Indian Tribes. As a harvester and seller of shellfish, Tobin was required to fill out a fish ticket each time he harvested geoducks. Fish tickets must be filed with the WDFW, who then uses the information from the fish tickets to manage the resource, to set seasons, and to establish quotas. Tobin did not file any fish tickets on the geoducks he harvested.

Tobin and his employees did all of the illegal harvesting at night to avoid being detected by authorities. After harvesting the clams, Tobin transported them to his packing plant, "Toulok," in Fife, Washington. Then he sold the stolen clams to various shellfish processors in Canada, California, and Washington.

Tobin employed many people in his organization, including divers, packers, and a pilot for the boat. Xiang (Jack) Li, owner of Five Oceans and Daisun, acted as a middle man and paid cash for the geoducks, which he shipped to processors in California during the period of June 10, 2001, to March 18, 2002. 1 CP 21. Toulok's invoices to Daisun corroborate Li's purchases from Toulok. Li stated that after December 2, 2001, Tobin began to send invoices directly to Ocean Harvester for the product that Li purchased from Tobin. Carl Chau, owner of Ocean Harvester, claims he made payments for the geoducks by making direct deposits into Li's bank accounts. Ocean Harvester's records and witness statements corroborate his claims.

Agents from the WDFW served a search warrant on Tobin's business, Toulok, and after reviewing the documents they seized, they determined the location where he sold the illegal geoducks. Then the agents obtained search warrants for the named seafood and shellfish outlets and served the warrants on those businesses. Using the documents they seized, including air

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bills, invoices, fish tickets, checks, and deposits, the agents determined the amount of geoducks illegally harvested and sold by Tobin from January 2000 through March 18, 2002.

II. The Crab Case

In June 2000, the WDFW received complaints from several citizens that a large commercial fishing boat was taking crab from the Nisqually Delta area. At the time, the State did not allow commercial crab harvesting below the Tacoma Narrows Bridge. The Nisqually Delta area is "within the Usual and Accustomed Fishing Grounds of the Nisqually Indian Tribe." Clerk's Papers (CP) (Aug. 27, 2004) at 153. The Nisqually Tribe, however, had no commercial crab season. Citizen complaints described a large boat named "Typhoon," which WDFW detectives knew Tobin owned. CP (Aug. 27, 2004) at 153.

After putting the Typhoon under surveillance, WDFW detectives watched as crew loaded the boat with fishing gear at night and returned in the morning with crabs or geoducks or both. WDFW detectives interviewed many of Tobin's former and current employees, who confirmed that Tobin was crab fishing in the Nisqually Delta area.

Tobin filed no fish tickets with the WDFW for the crab that he harvested from the Nisqually Delta area.

III. Evidence of Damages

Through the criminal investigation and accounting in this case, detectives executed search warrants at Bank of America in Fife; Norcal; Ocean Harvesters; Dakon Foods; Wong Tung; Green Valley Meats; Ranch 99 Markets; Daisun International; Toulok Seafoods; and Tobin's residence, vehicles, and vessels. Clear Bay Seafoods also voluntarily released sales and purchases records to a detective. The evidence obtained revealed sales, invoices, and deposited checks as payment for geoducks and/or crabs by the three California markets (Ocean Harvesters,

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Dakon Foods, and Norcal), as well as the Canadian market (Clear Bay Seafoods), a market in Oregon, and Washington markets.

The State hired expert William Omaitis, a Washington licensed private investigator “specializing in Forensic Accounting and Financial Investigations,” to examine this evidence and estimate the total pounds and sales value of stolen geoducks and crabs. CP (Oct. 12, 2004) at 91-92. Omaitis has an extensive background in criminal investigations, having served as a criminal investigator assisting the U.S. Attorney’s Office in “numerous Task Force investigations, conducted jointly with the FBI, Postal Inspectors, U.S. Customs, and other Federal, State, and Local law enforcement agencies.” CP (Oct. 12, 2004) at 91. Many of these investigations included income calculations “determined from incomplete or inaccurate financial records.” CP (Oct. 12, 2004) at 91. He also reported that he had testified “extensively before Federal Grand Juries and in criminal trials as case agent and government witness explaining complex financial transactions and computations.” CP (Oct. 12, 2004) at 91.

Omaitis’s analysis showed that Tobin and his conspirators “conservatively stole” 196,412 pounds of geoduck and 73,615 pounds of crab. He used two different methods to show damages to the State; he was able to use one method for both geoduck and crab and the other just for geoduck.

Using the first method, he valued the stolen geoducks at \$1,272,846.03 and the stolen crab at \$198,305.20. These estimates were based on sales invoices, sales records, and witness statements. Using the second method, he estimated the geoduck losses at \$764,408.40, the amount Tobin would have paid had he legally purchased the geoducks at Washington Department of Natural Resources (DNR) south Puget Sound geoduck auction prices. This value was determined by multiplying the net stolen monthly pounds by the bid price closest in time to

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the appropriate harvest period. DNR does not auction crab; thus, the value of crab is the value a harvester receives for them. The court adopted the estimation from the second method for the geoduck damages.

Omaits explained that most of the sales invoices in this case were secured from Toulok records during execution of the search warrant and investigation. He admitted that these invoices were "at best, incomplete." CP (Oct. 12, 2004) at 92. When an invoice was unavailable for geoduck, he used the purchaser's sales invoice to the subsequent buyer to determine the price per pound and dollar value for Toulok. When airway freight bills were the only evidence available to document sales to customers, Omaits determined that 10 to 15 percent of the total weight included packing and shipping boxes. He claimed that the number of estimated sales invoices he used to determine the total pounds and dollar value of stolen geoducks was 25 percent of the total. The remaining 75 percent came from actual Toulok sales invoices.

When an invoice was unavailable for crab sales, the "price per pound and pounds sold were 'backed into'" by a combination of statements from purchasers and their cancelled checks deposited into the Toulok checking account. CP (Oct. 12, 2004) at 93, 94. In other instances, Omaits used the same techniques he used for estimating geoduck sales and poundage. Omaits claimed that the total number of estimated calculations used to determine the total pounds and dollar amount of poached crab was 21 percent, and the remaining 79 percent came from actual Toulok sales invoices and/or the sales journal.

Omaits also considered additional documents and witness statements from Stacey Tobin; Julian Ng and Jeff Abulet of Clear Bay Seafoods in Vancouver, B.C.; Jack Li; Bill Shu of Five Oceans Seafood in El Toro, California; former Toulok employees; co-defendants; and others.

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He used those witness statements, along with DNR south Puget Sound geoduck auction prices, to estimate some of the dollar values of damages to the State.

Omaits stressed that when making his estimations, he used “[g]enerally accepted accounting principles and conservative number calculations.” CP (Oct. 12, 2004) at 91. For example, the poundage total that he derived did not include the 64,577 pounds of geoduck that Toulok purchased or fish tickets from other Native American harvesters, and it did not include the 45,802 pounds of crab purchased from other native and non-native crab harvesters.

In addition, Volz reported that WDFW costs for the investigation were approximately \$442,850.00. He asserted that two WDFW detectives spent about 75 percent of their time on the Tobin case for 18 months (\$196,000); one WDFW detective spent about 60 percent of his time for 12 months (\$57,000); one WDFW detective spent about 40 percent of his time for 18 months (\$45,600); and two other detectives spent about 20 percent of their time for 12 months (\$19,000), for a total WDFW detective cost of \$317,600.

He also outlined other expenses as follows:

Approximately 55 Fish and Wildlife Officers (wages and travel) who participated on March 17 and 18, 2002 for warrant executions and arrests, etc., representing a cost of about \$19,250.

A contract with Innerspace Exploration (side scan sonar) to locate and recover the crab pots in the Nisqually Delta at a cost of \$7,500.

The costs for 5-10 Officers and 3 patrol vessels . . . who participated in the recovery efforts of 106 of the crab pots [sic] that Tobin used to commercial fish for crab, a cost of about \$42,000.

Travel for one WDFW detective to California to execute warrants at the three California businesses who purchased Tobin’s illegal geoduck, a cost of \$1500.

The hiring of a secretary (1/2 time) to manage the documentary evidence, \$15,000.

The costs of Forensic Accountant Bill Omaits, \$30,000.

Storage and transportation costs of evidence (boats, vehicles, etc.) of seized items including boats and vehicles, \$10,000.

CP (Oct. 12, 2004) at 126-27.

ANALYSIS

I. Declarations Under RCW 9A.72.085³

Tobin argues that the State's declarations failed to meet the requirements of RCW 9A.72.085.⁴ Specifically, he maintains that the declarations are legally insufficient because they fail to state the date and place of execution; in fact, *all include the date*. The State counters that Tobin's argument overlooks that (1) Tobin failed to object to the admission of the declarations below; (2) the rules of evidence do not apply at restitution hearings; and (3) a mere technical defect in a declaration does not affect its admissibility in a restitution hearing. We agree with the State.

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004) (citing *State v. Swan*, 114 Wn.2d 613,

³ Tobin cites RCW 9A.75.085, which does not exist but he appears to mean RCW 9A.72.085.

⁴ RCW 9A.72.085 states the following, in part:

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (2) Is subscribed by the person;
- (3) States the date and place of its execution; and
- (4) States that it is so certified or declared under the laws of the state of Washington.

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658, 790 P.2d 610 (1990)); *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995). Thus, we will reverse only if the decision is one “no reasonable person would have decided . . . as the trial court did.” *Thomas*, 150 Wn.2d at 856 (citing *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)). Furthermore, “[p]roper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal.” *Thomas*, 150 Wn.2d at 856 (citing *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985)).

The hearing record shows no objection from Tobin about the form of any of the State’s declarations. And his numerous memoranda to the court include no argument about the form of the declarations. Because Tobin failed to object below, we decline to review this issue.

II. Reasonable Certainty of the Damages

Tobin argues that the State relied on unsupported and unreliable evidence; thus, the court’s award of restitution was an inaccurate reflection of the damages.

Under RCW 9.94A.753(3):

[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. . . . 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.

(Emphasis added.)

“Easily ascertainable” damages are tangible damages supported by sufficient evidence. *State v. Bush*, 34 Wn. App. 121, 123, 659 P.2d 1127 (1983). But “[c]ertainty of damages need not be proven with specific accuracy.” *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51 (1992) (citing *State v. Mark*, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984)); *see also Bush*, 34 Wn. App. at 124. Instead, Washington courts have held that “[o]nce the fact of damage is established, the precise amount need not be shown with mathematical certainty.” *Bush*, 34 Wn.

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App. at 123 (quoting *Quincy Farm Chems., Inc.*, 29 Wn. App. 93, 97-98, 627 P.2d 571 (1981)); see also *Pollard*, 66 Wn. App. at 785; *Mark*, 36 Wn. App. at 434.

A trial court has discretion to determine the amount of restitution. *Pollard*, 66 Wn. App. at 785 (citing *Mark*, 36 Wn. App. at 433). We will find an abuse of discretion only if the decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Pollard*, 66 Wn. App. at 785 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). For example, if the amount of damages is shown by “substantial credible evidence,” the trial court did not abuse its discretion. *Pollard*, 66 Wn. App. at 785 (quoting *Mark*, 36 Wn. App. at 434). In short, the restitution statute allows the trial court considerable discretion in determining restitution, “which ranges from none (in some extraordinary circumstances) up to double the offender’s gain or the victim’s loss.” *State v. Kinneman*, 155 Wn.2d 272, 282, 119 P.3d 350 (2005). Nor does the statute require that “the restitution ordered must be equivalent to the injury, damage or loss, either as a minimum or a maximum.” *Kinneman*, 155 Wn.2d at 282. Finally, the State need prove damages only by a preponderance of the evidence. *Kinneman*, 155 Wn.2d at 285.

1. Was There a Reasonable Basis for the Estimation of Damages?

Tobin argues that the estimate of damages Omaitis provided was not sufficiently accurate to establish the State’s loss. He posits that damages “must not be based on mere conjecture or speculation,” and he suggests that by accepting Omaitis’s estimate of the damages, the court violated this principle. Br. of Appellant at 8.

But Washington courts allow *estimated* damages in restitution cases. See, e.g., *State v. Awawdeh*, 72 Wn. App. 373, 379, 864 P.2d 965 (1994); *Bush*, 34 Wn. App. at 123; *Mark*, 36 Wn. App. at 434; *Pollard*, 66 Wn. App. at 785. Specifically, “the evidence of damages must be

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sufficient to afford a *reasonable basis for estimating* the loss and must not subject the trier of fact to mere speculation or conjecture.” *Awawdeh*, 72 Wn. App. at 379 (citing *Pollard*, 66 Wn. App. at 785) (emphasis added); *see also Bush*, 34 Wn. App. at 124 (stating that “[e]vidence of damage is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture”); and *see Haner v. Quincy Farm Chems., Inc.*, 29 Wn. App. 93, 97-98, 627 P.2d 571 (1981), *aff’d in part and rev’d in part on other grounds*, 97 Wn.2d 753 (1982). The question is not whether Omaitis *estimated* the damages, it is whether he derived his estimates from a *reasonable basis* that did not require the trial judge to speculate or conjecture as to the appropriate restitution.

Here, Omaitis reported his extensive investigation, which included reviewing invoices and other sales records, both from Tobin’s company and his product purchasers, witness statements, and airway freight bills; the State also presented numerous supporting declarations given under penalty of perjury.⁵ We conclude that the evidence was more than adequate to support Omaitis’s estimates and the trial court’s restitution awards.

Importantly, Tobin was running an illegal operation for which he did not keep complete and accurate business records. The legislature has expressed “a strong desire that offenders must pay restitution to the victims of their crimes.” *State v. Johnson*, 69 Wn. App. 189, 193, 847 P.2d 960 (1993). Thus, “[s]tatutes authorizing restitution should not be given ‘an overly technical construction which would permit the defendant to escape from just punishment.’” *Johnson*, 69 Wn. App. at 193 (quoting *State v. Davison*, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991)); *State v.*

⁵ E.g., declaration of Bob Sizemore; declaration of Edward Volz; declaration of Kevin Harrington; declaration of Wayne Polsson; and declaration of William Omatis.

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Mead, 67 Wn. App. 486, 490, 836 P.2d 257 (1992). Tobin should not escape paying restitution simply because he failed to keep detailed and accurate records of his criminal activities.

But Tobin argues that Omait's estimates of 21 percent and 25 percent are "too significant to support an award and as such render the award speculative and conjectural," citing *In re Marriage of Muhammad*, 153 Wn.2d 795, 108 P.3d 779 (2005). Br. of Appellant at 8. *Muhammad* is not a criminal restitution case; it concerned the property division a trial court ordered during a marriage dissolution. *Muhammad*, 153 Wn.2d at 797.

There, approximately \$8,200 (21 percent) of the husband's \$38,400 pension was accumulated during the 20-month pre-marriage cohabitation of the parties. *Muhammad*, 153 Wn.2d at 799. But the trial court declined to divide that \$8,200, awarding it entirely to the husband on the grounds that the amount was "minimal." *Muhammad*, 153 Wn.2d at 799-800. The Supreme Court reversed, commenting that few people would think half of \$8,200 to be minimal. *Muhammad*, 153 Wn.2d at 804.

Muhammad is not helpful. Omait's did not disregard 21 percent of any amount here. Rather, he was unable to locate Tobin's sales invoices for 21 percent of the crab sales and 25 percent of the geoduck sales. He, therefore, reconstructed the sales amounts from purchasers' records and air freight bills. Each method supports a reasonable estimate for the amount of missing sales invoices.

2. Were the Estimates Reasonably Accurate or Easily Ascertainable?

A. Lawfully Harvested Geoducks

Tobin also argues that Omait's declaration was insufficient to establish "easily ascertainable" damages. Br. of Appellant at 8. For example, he argues that Omait's did not distinguish between *lawfully harvested* and *stolen* shellfish that were shipped by air freight. He

complains that Omaitis “simply concluded that all air freight shipments of shellfish for which he could not find other sales documentation was stolen.” Br. of Appellant at 8. As support for this assertion, he cites to Jeff Abulet’s declaration.⁶ Yet neither Tobin’s brief nor Abulet’s declaration identify any precise or estimated amount of supposedly legally harvested shellfish sent by air freight. Furthermore, in Volz’s declaration, Volz stated that “to ensure accuracy, all questionable Tobin sales records of shellfish were excluded from analysis.” CP (Oct. 12, 2004) at 126. And once the fact of damage is established, the precise amount need not be shown with “mathematical certainty”; see *Bush*, 34 Wn. App. at 124; the State need prove the damages at an evidentiary hearing only by a *preponderance of the evidence*; *Kinneman*, 155 Wn.2d at 357. Tobin has not shown that the State failed to meet its burden or that the lower court’s decision was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

B. Clear Bay Shipping to Tobin

Tobin also argues that the record does not support the assumption that Clear Bay would not ship products to Tobin and that calculations based on this assumption are not appropriate. He stresses that Abulet stated in his declaration that “[o]n occasion, for various reasons, Clearbay [sic] Fisheries would send geoduck product to Seattle over the Canadian border to the Toulok [Tobin] plant for shipment to customers in various parts of the United States.” CP (Aug. 27, 2004) at 232. Notably, Abulet did not provide the “various reasons” or elaborate on this statement.

In contrast, Harrington stated:

[T]here is circumstantial evidence of the common business practices in the geoduck industry that indicates the geoduck invoiced by Clear Bay and shipped

⁶ In fact, Abulet does not state anywhere in his declaration that any sales from Toulok to Clear Bay were legal. His declaration lends no support to Tobin’s argument.

from Sea Tac had originated in Washington. There would be no logical reason for Clear Bay, who has their own processing plant in Vancouver B.C., to pay to have their geoduck driven across the border two hundred miles to Tacoma Washington to be packed by Toulok and then shipped from Sea-Tac airport. The geoduck market is a live market and the time lost alone, not to mention the extra transportation costs incurred, would make this a totally impractical business practice. In all of my experience investigating the geoduck industry, including extensive work examining airline records, I am not aware of a single instance of a Canadian company transporting geoduck harvested in Canada to Sea/Tac Airport.

CP (Oct. 12, 2004) at 58.

Furthermore, Julian Ng, co-owner of Clear Bay, told Harrington that Clear Bay would either pick up the product themselves from the Toulok plant or they would have the product delivered by Tobin or a freight forwarder. And Stacy Tobin, Tobin's daughter and employee, told Harrington that "[Toulok] never packed any geoduck for Clear Bay." CP (Oct. 12, 2004) at 68.

In addition, Ng recalled that sometimes Tobin would fill orders for Clear Bay customers by shipping his geoducks from Sea-Tac airport to Clear Bay's customers as directed by Clear Bay. In those cases, the invoice would be made out to the Clear Bay customer. The air bills for these transactions listed Toulok as the shipper and the product point of origin as Sea-Tac airport. Harrington testified that there are corresponding air bills for each of these shipments and the dates and amounts of product are the same as on the Clear Bay invoice.

Carl Chau, owner of Ocean Harvester, told Harrington that in 2001, he purchased geoduck from Five Oceans. He said that all of the Five Oceans's invoices that bore the initials C.B. (standing for Clear Bay) were for geoducks shipped by Toulok at the direction of Clear Bay. He claimed that the geoduck boxes contained health tags indicating that Toulok was the original source and that the geoducks were a Washington product.

Thus, the State produced persuasive evidence that Tobin never shipped legal product. In any event, the Abulet affidavit conflicts with the evidence that the trial judge resolved against Tobin. The court properly made a credibility determination between the conflicting evidence.

C. Li's Mark-Up and his Motive

Tobin also argues that Omait's calculations do not account for the fact that Li was a middle man who included a mark-up in his sales price and that by calculating the geoduck poundage from these deposits, Omait's approach overestimates the amount of geoduck because it calculates the poundage based on deposits that include a mark-up. This argument fails because the court adopted the Omait's geoduck estimation that relied solely on evidence of poundage; Omait relied on price when he used the "backing into" method for estimating crab sales, not the geoduck sales.

Tobin also argues that the information in Harrington's declaration was unreliable because Li had a personal motive to shift blame and curry favor with the government in hopes of avoiding or lessening his own potential punishment for his own crimes. Even if Li did have such a personal motive, his story was corroborated by invoices, health tags, Ocean Harvester records, bank deposit slips, and statements from Chau.

3. Investigative and Administrative Costs

Tobin contends that the trial court erred by including investigative and administrative costs in the restitution order because "the State did not *prove* the costs and because the costs were not *sufficiently related* to Mr. Tobin's actions." Br. of Appellant at 12 (emphasis added). He contends that nowhere does Volz support his estimations with any supporting documentation, such as time sheets, pay stubs, or similar corroborating information.

Restitution is proper when a causal connection exists between the crime and the injuries for which compensation is sought. *State v. Vinyard*, 50 Wn. App. 888, 894, 751 P.2d 339 (1988). In deciding whether a restitution order is within a trial court's statutory authority, we use a "but for" factual test to evaluate the causal link between the criminal acts and a victim's damages. *State v. Hunotte*, 69 Wn. App. 670, 676, 851 P.2d 694 (1993) (citing *State v. Blair*, 56 Wn. App. 209, 215, 783 P.2d 102 (1989)); *State v. Harrington*, 56 Wn. App. 176, 180, 782 P.2d 1101 (1989); *State v. Barrett*, 54 Wn. App. 178, 179, 773 P.2d 420 (1989).

In *State v. Johnson*, 69 Wn. App. 189, 190, 847 P.2d 960 (1993), a bookkeeper and office manager pleaded guilty to embezzling checks and currency from her employer. On appeal, the defendant challenged the portion of the restitution order that required her to pay expenses relating to the investigation of business records and other goods she stole. *Johnson*, 69 Wn. App. at 190. The restitution figure included the cost of having various individuals, including an accountant, review the employer's business records, a cost the court held to be a reasonable consequence of the defendant's embezzling. *Johnson*, 69 Wn. App. at 192-93.

Like the costs in *Johnson*, but for Tobin's thefts, the WDFW would not have incurred the investigative and administrative costs. Thus, such costs are a reasonable consequence of Tobin's crimes.

Tobin is correct that Volz estimated the costs without attaching supporting documentation, such as time sheets or pay stubs. But Tobin did not object to the evidence on this basis below, and he has cited no rule that states evidence in restitution hearings must be supported by corroborating evidence. Volz's declaration was executed under penalty of perjury, and Tobin has presented no evidence to contradict Volz's estimations or to show that his declaration is unreliable.

4. Losses to Native American Tribes

Tobin argues that “[a]s made clear by the Squaxin Island Tribe memorandum, the State has no right to any geoducks taken within Squaxin fishing territory, thus it was error to include such geoducks in the restitution ordered to the State.” Br. of Appellant at 13. In fact, the trial court did not consider the Squaxin Tribe memorandum when making the restitution order because it found the brief was not in proper form and was not timely filed. In general, an appellate court is confined to evidence and arguments presented to the trial court. *State v. Elmore*, 139 Wn.2d 250, 302, 985 P.2d 289 (1999) (citing *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wn. 2d 513, 522, 852 P.2d 288 (1993)); *Casco Co. v. Pub. Util. Dist. No. 1*, 37 Wn.2d 777, 784-85, 226 P.2d 235 (1951). Accordingly, we decline to consider the Squaxin Tribe memorandum.

Regardless, Tobin has no standing to make the argument; he has not shown that he can assert the interests of the Native American Tribes. And even if he did have standing, a dispute about the distribution of the award is not ripe. Indeed, certain tribes have a right secured by federal treaty to harvest shellfish at their usual and accustomed fishing places. *See United States v. Washington*, 873 F. Supp. 1422, 1429 (W.D. Wash. 1994). But the lower court’s order did not violate this rule or award the value of tribal geoducks to the State alone; instead, the court awarded restitution to the DNR; the WDFW; and the Nisqually, Squaxin, and Puyallup Indian Tribe. The court specified that distribution of funds will be allocated “per negotiations of tribes and Dept. of Natural Resources,” placing no restrictions on those allocations. CP (Oct. 12, 2004) at 78. It is up to the State and the tribes to distribute the damages according to their respective interests; the lower court did not interfere with the tribes’ right to assert their treaty interests in *all* or a portion of the geoduck.

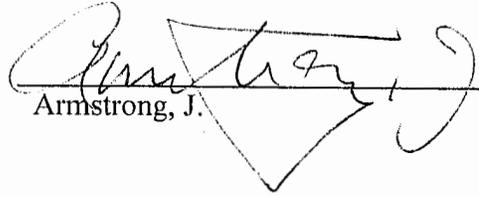
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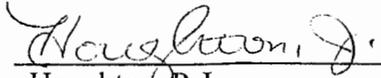
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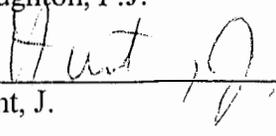
No. 31636-6-II (Cons. w/ No. 31646-3-II)

Affirmed.


Armstrong, J.

We concur:


Houghton, P.J.


Hunt, J.