

NO. 69454-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRIAN SAWYER,

Appellant.

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

Trial courts have broad authority to order restitution. Here, the defendant's accomplice stole thousands of pounds of copper (worth tens of thousands of dollars) from his employer over a 14 month period. The defendant then knowingly sold the stolen copper to at least one commercial metal recycler over the same period. Following the defendant's conviction, the State sought restitution in the amount of \$31,872.45 for the 7,395 pounds of stolen copper that the defendant had sold to one particular metal recycler. The trial/sentencing court ordered restitution in that amount. Did the court abuse its discretion?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant, Brian Sawyer, was charged with one count of Trafficking in Stolen Property in the First Degree for knowingly receiving stolen copper ingots from an accomplice and then selling them to a commercial metal recycler. CP 7-8. Both the theft of the copper by the accomplice and the trafficking by Sawyer took place over the 14 months period between March 1, 2010, and May 31, 2011. Id.

Sawyer went to jury trial before the Honorable Lori K. Smith. Supp. CP \_\_\_\_ (Sub No. 49D, Clerk's Minutes); 1RP – 7RP.<sup>1</sup> The jury convicted Sawyer as charged and found that the crime was a major economic offense. CP 14, 17; 7RP. The court imposed a standard range sentence. CP 48-54; 8RP 12-15. At a hearing following sentencing, the court ordered restitution in the amount of \$31,872.45 for the value of 7,395 pounds of copper that the defendant had sold at one commercial metal recycler during the charging period. CP 67-68; Supp. CP \_\_\_\_ (Sub No. 83, Documents Considered By The Court In Ordering Restitution And Declaration Of Patrick H. Hinds (hereinafter "Restitution Documents")); 9RP.

This timely appeal followed. CP 56-66.

## **2. SUBSTANTIVE FACTS**

Commercial Metal Recycling, Inc. (Commercial Metal) is a business specializing in metal recycling. 4RP 15-16. Commercial Metal purchases all types of scrap metal on a "walk-in" basis. 4RP 15-16. In 2010 and 2011, Brenna Otto was the manager and controller at Commercial Metal. 4RP 15. During the same time

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<sup>1</sup> The State will use the same designation of the verbatim report of proceedings as used by Sawyer. See Brief of Appellant at 1, n. 1.

period Mike Holman was a scale operator for the company. 4RP 23-24, 76-77.

The defendant, Brian Sawyer, was a frequent customer who would sell scrap metal to Commercial Metal. 4RP 20-22, 80. Both Otto and Holman were familiar with Sawyer and his sales to Commercial Metal. 4RP 22, 80. By May of 2011, both Otto and Holman had become suspicious of the materials that Sawyer was selling to Commercial Metal. 4RP 44-51, 82-86. Over the preceding months, Sawyer had begun to frequently bring in hundreds of pounds of copper at a time. 4RP 44-51, 82-84, 88. This copper was still in the form of ingots, which did not seem to have been used in any way. 4RP 44-51; Ex. 2. As result, the copper appeared to be a raw industrial input material rather than scrap, waste, or material intended for recycling. 6RP 31-32. Sawyer brought the ingots into Commercial Metals in distinctive grey, five-gallon, plastic buckets which frequently had red or black plastic lids. 4RP 46-49, 83-85; Ex. 3-5. No other Commercial Metals customer brought in copper in the same form or similar quantities. 4RP 83-84. Based on this, Holman and Otto began to suspect that the copper might be stolen. 4RP 51-53.

Using Commercial Metal's customer records, Otto was able to create a spreadsheet showing their purchases of copper from Sawyer between March 4, 2010 and May 17, 2011. 4RP 55-58, 62-68. The spreadsheet showed that Sawyer sold "#1 Copper" to Commercial Metal on 36 occasions during that time. Ex. 6. In more than half of the occasions, Sawyer brought in more than two hundred pounds of copper at a time in the form of buckets of ingots. 4RP 72-74; Ex. 6. Each time that the sale was for more than two hundred pounds, it was either about 200 pounds or about 400 pounds. Ex. 6. The total amount of copper sold to Commercial Metal by Sawyer during this period was 7,395 pounds. Ex. 6. Sawyer received a total of \$25,677.95 from Commercial Metal for the copper. 4RP 68; Ex. 6.

Pacific Police Department Detective Newton was familiar with Commercial Metal and with Otto.<sup>2</sup> 4RP 24; 6RP 29-31. In May of 2011, Detective Newton conducted a routine business check at Commercial Metal. 6RP 29-30. At that time, Otto shared with Detective Newton her suspicion that Sawyer was selling them stolen copper. 4RP 51-51; 6RP 30-33, 35-36. She showed Newton an

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<sup>2</sup> One of Otto's responsibilities was to attempt to insure that Commercial Metal did not purchase stolen scrap metal. 4RP 20-21. In attempting to fulfill this responsibility, Otto had frequent contact with the Pacific Police Department in general and with Detective Newton in particular. 4RP 24.

example of the copper ingots in question, told him the quantities and frequencies of his sales, and described the distinctive grey, plastic buckets he was bringing the copper into the facility in. 4RP 51-53; 6RP 31-33, 35-36.

On May 17, 2011, Detective Newton spoke to Sawyer about the copper. 6RP 36. Sawyer claimed that he was getting it from “a guy” in West Seattle and that the copper was scrap. 6RP 37-38. However, Sawyer claimed that he did not know “the guy’s” name or phone number and that “the guy” called him. 6RP 38. Sawyer did not sell any more copper to Commercial Metal after been contacted by Detective Newton. 4RP 65.

At some point in June, Gary Mintz – another Commercial Metal customer and an acquaintance of Sawyer – had a conversation with Sawyer. 4RP 90-93. During that conversation, Sawyer told Mintz that he was getting the copper from an employee of Rainier Ballistics. 5RP 27. Mintz saw an example of the copper ingots Sawyer was selling – it was identical to what was being taken from Rainier Ballistics and sold to Commercial Metal. 5RP 28-29, Ex. 2.

Detective Newton determined that Rainier Ballistics was a specialty bullet manufacturer based in Fife, Washington. 5RP 93; 6RP 40. In late June of 2011, Detective Newton contacted Rainier

Ballistics's Production Manager, John O'Connell. 5RP 93, 113; 6RP 40. O'Connell confirmed that Rainier Ballistics used copper in the plating phase of their production process. 5RP 99. O'Connell showed Detective Newton a sample of the ingot form that they purchased their copper in. 5RP 104, 113-14; 6RP 40-41. The ingot was identical to the ingots that Sawyer had been recycling at Commercial Metal. 5RP 104, 113-14; 6RP 40-41. Rainier Ballistics was the only manufacturer in the State of Washington that purchased copper ingots in that form. 5RP 105-06, 147, 158. The ingots were received from the supplier in grey, plastic, five-gallon buckets with either a red or black plastic lid<sup>3</sup> and were stored in the same buckets at the Rainier Ballistics facility. 5RP 102-03, 110-12; 6RP 12-13; Ex. 3-5, 10-14. Each bucket held approximately 220 pounds of copper ingots. 5RP 103. O'Connell did not know Sawyer and Sawyer had no known connection to Rainier Ballistics. 5RP 96, 113-14.

Detective Newton suggested that Rainier Ballistics do an inventory to see if they were missing any copper. 5RP 114-15, 121.

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<sup>3</sup> Rainier Ballistics used two different types of copper in its manufacturing process – "oxygen free" and "regular." 5RP 100-103; 6RP 12-14. Both were purchased from the same manufacturer and came in the same sort of grey, plastic, five-gallon bucket. 5RP 100-103; 6RP 12-14. The two types of copper were indistinguishable to the naked eye. 5RP 100-103; 6RP 12-14. The buckets of "oxygen free" copper had red plastic lids. 5RP 100-103; 6RP 12-14. The buckets of "regular" copper had black plastic lids. 5RP 100-103; 6RP 12-14.

In the course of Rainier Ballistics's internal investigation, it was discovered that the Plating Manager – Lee Egnaw – had not been tracking the copper on hand via an actual inventory, but had instead been relying on the production numbers to determine how much copper had been used and how much was left. 5RP 115-19, 121-23; 6RP 15-17, 22. Rick Lengston, another Rainier Ballistics employee, conducted a physical inventory and discovered that approximately 7,000 pounds of copper was actually missing. 5RP 115-19, 121-23; 6RP 18-20. Moreover, the amount of copper that Rainier Ballistics went through and its production process was such that someone working on the plating line could have easily stolen a hundred pounds (or more) of copper a week indefinitely without it being noticed or caught by the inventory. 6RP 21-22.

In the ongoing course of the investigation, suspicion focused on a specific Rainier Ballistics employee named David Gordon. 6RP 41-42. Gary Mintz recognized Gordon's name as being associated with Sawyer, but could not remember any other details. 5RP 27. Gordon was employed as a plater and worked the night shift at Rainier Ballistics. 5RP 98, 123. Because he worked nights, Gordon was almost always alone or with only one other person in the facility. 5RP 123-29. Even when that other person was present, the nature of

Rainier Ballistics's production process and the layout of the facility was such that the other employee would not be able to see or hear Gordon (or even know for certain whether he was actually in the building). 5RP 123-29. In addition, as part of his job Gordon used large amounts of copper and had unfettered access to Rainier Ballistics' supply of the metal. 5RP 123-29. As a result, Gordon could have easily removed copper from the facility (or allowed someone else to enter the facility to do so) without anyone knowing. Moreover, Lengston had previously noticed that the usage logs completed by Gordon claimed that he had used substantially more copper than the production process could physically accommodate without any waste or scraps to account for the overage. 6RP 22-23. These unexplained overages often added up to one or two hundred pounds of copper at a time. 6RP 23. Finally, Gordon had called in sick at about the time that Lengston conducted the physical inventory and had not returned to work afterward. 5RP 130-31.

On July 13, 2011, O'Connell called the Fife Police Department to report the theft of copper from Rainier Ballistics. 5RP 39, 42, 131. O'Connell told Fife Police Department Detective Tom Gow that he believed that Gordon – who had subsequently been terminated – would return to Rainier Ballistics the next day to pick up his last

paycheck. 5RP 39-40, 131. Detective Gow then spoke to Detective Newton and was briefed on the situation. 5RP 40. On July 14, 2011, Gordon arrived at Rainier Ballistics as expected. 5RP 42, 131. O'Connell called Detective Gow, who arrived with other Fife Police Department officers. 5RP 42-43, 131-32. As soon as he saw officers arriving, Gordon fled. 5RP 42-43, 131-32. He was arrested after a short pursuit. 5RP 42-45.

The Commercial Metal spreadsheet prepared by Otto was shown to O'Connell. 5RP 132; Ex. 6. He determined that, in virtually all instances, Gordon had worked the night shift immediately prior to the day of Sawyer's sale of copper to Commercial Metal. 5RP 132-36. O'Connell also noticed that, at one point, there was a distinct and noticeable lull in the frequency of Sawyer's sales of copper to Commercial Metal. 5RP 132-36. The time frame of this lull corresponded to a time period when Gordon was working the day shift and did not have unsupervised access to Rainier Ballistics's copper storage. 5RP 134-136. Rainier Ballistics also did not have any unexplained shortages in copper after Gordon left the company. 5RP 136; 6RP 25.

**C. ARGUMENT**

**1. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S RESTITUTION ORDER.**

**a. Additional Relevant Facts.**

As part of the judgment and sentence, the court ordered Sawyer to pay restitution. CP 50; 8RP 13-14. A restitution hearing was held on November 19, 2012, to determine the amount to be ordered. 9RP.

At the hearing, the State requested that Sawyer be ordered to pay \$31,872.45.<sup>4</sup> CP 67-68; Supp. CP \_\_\_\_ (Sub No. 83, Restitution Documents); 8RP 2. This amount was derived by multiplying the amount of copper that Sawyer had sold to Commercial Metal (7,395 pounds) by \$4.31 per pound (the average price that Rainier Ballistics paid for copper over the period in question). 8RP 6; Ex. 6, 9. In support of this amount, the State relied on the evidence produced at trial and a letter from O'Connell that had been provided to the court. Supp. CP \_\_\_\_ (Sub No. 83, Restitution Documents); 8RP 2, 4-6.

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<sup>4</sup> The State's request was that \$30,000 go to Western National Insurance and \$1,872.45 to Rainier Ballistics. CP 67-68; Supp. CP \_\_\_\_ (Sub No. 83, Restitution Documents); 8RP 2, 6.

Sawyer objected to this amount. 8RP 3. Sawyer argued that the evidence had shown that he had sold other forms of copper to Commercial Metal – besides the ingots stolen from Rainier Ballistics – during the period in question. 8RP 4. Sawyer further asserted that Rainier Ballistics had only adequately documented a shortage of eight 220-pound buckets of copper (1,760 pounds total) in Lengston's inventory. 8RP 3-4. Sawyer argued that the proper restitution amount was, therefore, \$7,585.60 (1,760 pounds multiplied by the \$4.31 per pound average). 8RP 3

In response, the State argued:

- that both via the testimony of O'Connell and Lengston and O'Connell's letter, Rainier Ballistics had documented that over 10,000 pounds of copper had likely been taken from the company<sup>5</sup>;
- that the vast majority of the sales by Sawyer to Commercial Metal were in a form (ingots in the distinctive lidded buckets) and amount (multiples of 220 pounds, which corresponded to the amount of copper that Rainier Ballistics kept in each bucket) that supported the conclusion that the copper had come from Rainier Ballistics<sup>6</sup>; and
- that Rainier Ballistics's insurance company had concluded that the theft of the copper from the company was a compensable loss worth at least

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<sup>5</sup> 8RP 5

<sup>6</sup> 8RP 5.

\$30,000 (the limit for the relevant policy) and had paid Rainier Ballistics that amount<sup>7</sup>.

8RP 4-6. The State argued that, as a result, the way in which it had calculated restitution was the least speculative method and that \$31,872.45 was, therefore, the proper amount of restitution. 8RP 6.

The trial court ultimately agreed with the State and ordered restitution in the requested amount. CP 67-68; 8RP 6-7.

**b. Relevant Law.**

Under RCW 9.94A.753(5), a sentencing court shall order restitution "whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property." There are a number of identified purposes for restitution. The most commonly advanced are to punish defendants, to force them to face the consequences of their actions, and to compensate victims for their losses. See, e.g., State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991); State v. Fleming, 75 Wn. App. 270, 275, 877 P.2d 243 (1994)<sup>8</sup>; State v. Mead, 67 Wn. App. 486, 490, 836 P.2d 257 (1992). Restitution attempts to achieve these purposes by

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<sup>7</sup> 8RP 6.

<sup>8</sup> Fleming was overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

requiring the defendant to pay the amount necessary to restore the victim to the same position he or she was in before the crime was committed.

In this regard, the Legislature has expressed a strong desire that offenders pay restitution to the victims of their crimes. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). Therefore, while a trial court's authority to order restitution is purely statutory, the statute gives the trial court "broad powers of restitution." Id. (quoting Davison, 116 Wn.2d at 922). Thus, statutes authorizing restitution should not be given an overly technical construction that would permit a defendant to escape from just punishment. Id. Rather, the restitution statutes are to be interpreted broadly to carry out the Legislature's intent. State v. Israel, 113 Wn. App. 243, 299, 54 P.3d 1218 (2002); State v. Hennings, 129 Wn.2d 512, 519, 919 P.2d 580 (1996).

When exercising this broad authority, trial courts are to be guided by two principles. First, there must be a causal connection between the crime committed and the given loss. State v. Enstone, 137 Wn.2d 675, 974 P.2d 828 (1999). Second, the amount of the loss must be "easily ascertainable." Id. The burden is on the State to prove both the causal connection and the amount of restitution

by a preponderance of the evidence. Tobin, 161 Wn.2d at 524 (citing State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005)). In determining whether the State has met its burden, the court may consider information admitted, acknowledged, or proved at trial or at the time of sentencing or restitution hearing. State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000).

A causal connection exists when, "but for" the offense committed, the loss or damages would not have occurred. State v. Hunotte, 69 Wn. App. 670, 676, 851 P.2d 694 (1993). It is not required that the specific injury or method of injury be foreseeable. Enstone, 137 Wn.2d at 682.

Once the fact of damage is shown, the specific amount does not need to be proven with specific accuracy or mathematical certainty. State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984) (citing State v. Bush, 34 Wn. App. 121, 659 P.2d 1127 (1983)). Rather, the amount of loss is "easily ascertainable" if it "affords a reasonable basis for *estimating* loss and does not subject the trier of fact to mere speculation or conjecture. Mark, 36 Wn. App. at 434 (emphasis added). In this context, it is accepted that, in the course of a restitution hearing following a criminal conviction, it may not be possible to determine exactly how much was lost by

the victim due to the defendant's actions. It is for just this reason that courts allow for estimations and do not require the amount of loss to be established with specific accuracy. As the court held in State v. Kinneman,

While the restitution statute directs that restitution "shall" be ordered, *it does not say that the restitution ordered must be equivalent to the injury, damage or loss, either as a minimum or a maximum*, nor does it contain a set maximum that applies to restitution. Instead, RCW 9.94A.753 allows the judge 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.

155 Wn.3d 272, 282, 119 P.3d 350 (2005) (emphasis added). In other words, the law recognizes that restitution awards are often inherently inaccurate and may not directly match the amount actually lost by the victim.

As a result of the trial court's broad power to order restitution, this Court reviews a trial court's order only for abuse of discretion. Hunotte, 69 Wn. App. at 674; Davison, 116 Wn.2d at 919 (imposition of restitution is generally within trial court's discretion and will not be disturbed on appeal absent abuse of discretion). Therefore, this Court reverses a restitution award only

when it is manifestly unreasonable or based on untenable grounds or reasons. Enstone, 137 Wn.2d at 679.

**c. The Trial Court Did Not Abuse Its Discretion In Ordering Sawyer To Pay Restitution In The Amount Of \$31,872.45.**

In this case, the trial court found that there was a causal connection between the crime Sawyer committed and the loss to Rainier Ballistics and its insurance company. The trial court also found that \$4.31 per pound was the proper price to use to value the copper stolen from Rainier Ballistics and trafficked by Sawyer. The trial court further found that, for the purposes of restitution, the 7,395 pounds of copper sold by Sawyer to Commercial Metal was the best and least speculative amount to use to set the amount of copper to which to apply the \$4.31 per pound value. None of these findings constituted an abuse of the court's broad discretion with regard to restitution.

As an initial matter, Sawyer does not appear to challenge either that there was a causal connection between his crime and the loss OR the \$4.31 per pound figure. Rather, his challenge is based solely on the assertion that the State failed to adequately prove the amount of the loss. Brief of Appellant at 8-10. Sawyer

further breaks this assertion down into two sub-points and argues that the State failed to establish both: (1) that more than 1,760 pounds of copper had actually been taken from Rainier Ballistics; and (2) how much of the copper sold by Sawyer to Commercial Metal had come from Rainier Ballistics. Id. These arguments should be rejected as the State presented sufficient evidence to establish both by a preponderance of the evidence.

First, despite Sawyer's assertion to the contrary, the State presented sufficient evidence to establish that 7,395 pounds was a reasonable estimate of the amount of copper that had been taken from Rainier Ballistics. At the restitution hearing, the State presented documentation from O'Connell – the Production Manager at Rainier Ballistics – who estimated that, based on all of the information known to company, more than 10,000 pounds of copper had actually been taken from them over the relevant period (March 4, 2010, to May 31, 2011). Supp. CP \_\_\_\_ (Sub No. 83, Restitution Documents); 9RP 5. The company that insured Rainier Ballistics against employee theft concluded that at least \$30,000 worth of copper (the policy maximum) had been stolen and paid that amount to the company. 8RP 6.

In this context, the trial court's conclusion that 7,395 pounds was a reasonable estimate of the amount of copper that had been stolen from Rainier Ballistics was supported by the evidence adduced at trial regarding Sawyer's sales of copper to Commercial Metal. Between March 4, 2010, and May 17, 2011, Sawyer sold more than 200 pounds of copper per day to Commercial Metal on 19 separate days. Ex. 6. And each time that Sawyer sold more than 200 pounds: (1) the copper exclusively consisted of the distinctive ingots that had come from Rainier Ballistics; (2) the copper was brought to Commercial Metal in the distinctive grey, plastic buckets that Rainier Ballistics purchased and stored its copper in; and (3) the amount of ingots was roughly a multiple of the quantity of copper (about 220 pounds) that Rainier Ballistics stored in one bucket. 4RP 44-51, 72-74, 82-85, 88; 5RP 102-04, 110-14; 6RP 12-13, 40-41; Ex. 3-6, 10-14. Thus, in these transactions alone, Sawyer sold 7,022 pounds of copper to Commercial Metal that had clearly come from Rainier Ballistics. Ex. 6. Moreover, the remaining 373 pounds of copper that Sawyer sold to Commercial Metal over the relevant time period certainly might have contained more of the stolen ingots. In addition, there are numerous other commercial metal recyclers in the area where

Sawyer could also have been selling copper taken from Rainier Ballistics. 4RP 22-23.

The conclusion that 7,395 pounds was a reasonable estimate of the amount of copper that had been stolen from Rainier Ballistics was also corroborated by the evidence adduced at trial from Rainier Ballistics employees. The physical inventory performed by the company showed that thousands of pounds of both "oxygen free" and "regular" copper were missing compared to the amount that would have been used up in normal production (as tracked via usage logs). 5RP 115-19, 121-23; 6RP 14-22. In addition, the usage logs themselves overestimated the amount of copper used by the company because Gordon repeatedly listed more copper being used (by several hundred pounds per plating run) than actually could have been. 6RP 22-23. As a result, the amount of copper that Rainier Ballistics should have had left on hand should have actually been substantially higher than indicated in the logs. Moreover, even if the information recorded in the logs themselves had been wholly accurate (in terms of the amounts of copper used in production), the production process and control systems used by Rainier Ballistics were such that a hundred

pounds of week or more of copper could have been taken from the company without it being caught by any inventory. 6RP 21.

Despite this, now Sawyer argues that the evidence only established that between 2,580 and 3,414 pounds of copper were taken from Rainier Ballistics. Brief of Appellant at 8-9. But Sawyer's argument ignores significant portions of the evidence before the trial court and should be rejected. Sawyer's entire argument is based on parsing the number of pounds of copper found in the "hand inventory" performed by Lengston. *Id.* at 9. This argument, however, simply ignores the additional evidence – outlined above – *that Sawyer personally sold at least 7,022 pounds of Rainier Ballistics copper to Commercial Metal.* Given that there was no legitimate way that Sawyer would have had this copper, at least this much must, logically, have been stolen from the company. Nor does the fact that Lengston's "hand inventory" came up with a lesser amount of copper missing cast any doubt on this evidence. As described above, there are numerous ways in which the hand inventory would have dramatically underestimated the amount of

copper that had been taken from Rainier Ballistics over the relevant time period.<sup>9</sup>

Second, despite Sawyer's assertion to the contrary, the evidence was sufficient to establish that 7,395 pounds was a reasonable estimate of the amount of copper sold by Sawyer that had been stolen from Rainier Ballistics. As noted above, it is virtually certain that 7,022 pounds of the copper that Sawyer sold to Commercial Metal had been taken from Rainier Ballistics. It is unknown how much of the remaining 373 pounds of copper that Sawyer sold to Commercial Metal had been taken from Rainier Ballistics. But given the total amount of copper that Rainier Ballistics was actually missing – potentially more than 10,000 pounds – and the fact that Sawyer could have also been selling this copper to other recyclers, 7,395 pounds of copper is not an unreasonable estimate.

Despite this, Sawyer argues that the evidence is insufficient to establish how much of the copper he sold to Commercial Metal actually came from Rainier Ballistics. Brief of Appellant 9-10. In support of this argument, Sawyer essentially relies on the fact that

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<sup>9</sup> Sawyer's summary of the testimony also fails to distinguish between "oxygen free" and "regular" copper and does not account for the fact that they were used at different rates.

some of the copper that he sold likely did not. Brief of Appellant at 9-10. While this is true, it does not significantly change the analysis. It is unknown *exactly* how much of the copper sold to Commercial Metal by Sawyer was taken from Rainier Ballistics. But the law does not require that the amount of restitution be established with exact certainty so long as there is a reasonable basis for estimating the loss. Mark, 36 Wn. App. at 434.

Here, there is such a basis. As outlined above, the evidence established that: (1) Sawyer sold 7,395 pounds of copper to Commercial Metal; (2) at least 7,022 pounds of that copper had come from Rainier Ballistics; (3) some portion of the 373 pounds of uncertain origin *may* have come from Rainier Ballistics; and (4) Sawyer may also have sold Rainier Ballistics copper to a recycler other than Commercial Metal.<sup>10</sup> In this context, while the conclusion that Sawyer probably sold 7,395 pounds of copper taken from Rainier Ballistics is “merely” an estimate, it is not an improperly speculative one.

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<sup>10</sup> It is worth pointing out that there is nothing about the crime Sawyer was convicted of that would in and of itself limit the restitution to copper sold to Commercial Metal. While there was no evidence before the court that Sawyer had sold copper from Rainier Ballistics to any other metal recycler, the possibility that he might/could have is something that must be considered in evaluating the evidence actually adduced.

**D. CONCLUSION**

Given all of the above, there was sufficient evidence for the trial court to conclude that 7,395 pounds was a reasonable estimate of the amount of copper stolen from Rainier Ballistics. Indeed, some of the evidence suggested that the amount taken could have been significantly higher. Similarly, there was sufficient evidence for the trial court to conclude that 7,395 pounds was a reasonable estimate of the amount of copper sold by Sawyer that came from Rainier Ballistics. As neither of these conclusions was manifestly unreasonable, this court should affirm the restitution order.

DATED this 23<sup>rd</sup> day of September, 2013.

Respectfully submitted,

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