

2015

**State of Utah, Plaintiff/Appelle, vs. Colorado Steven Irwin,
Defendant/Appellant : Reply Brief**

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Reply Brief, *State of Utah v Colorado Steven*, No. 20150217 (Utah Court of Appeals, 2015).
https://digitalcommons.law.byu.edu/byu_ca3/3256

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

Plaintiff/Appellee,

v.

COLORADO STEVEN IRWIN,

Defendant/Appellant.

Case No. 20150217-CA

Appellant is not incarcerated.

REPLY BRIEF

Appeal from a restitution order following guilty pleas to Theft by Receiving Stolen Property, a third degree felony, in violation of Utah Code §76-6-408, and Burglary, a third degree felony, in violation of Utah Code §76-6-202, in the Third District Court, in and for Salt Lake County, State of Utah, the Honorable Charlene Barlow presiding.

TERESA L. WELCH (9554)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

WILLIAM M. HAINS (13724)
UTAH ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114

Attorney for Appellee

FILED
UTAH APPELLATE COURTS

DEC 18 2015

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

COLORADO STEVEN IRWIN,
Defendant/Appellant.

Case No. 20150217-CA

Appellant is not incarcerated.

REPLY BRIEF

Appeal from a restitution order following guilty pleas to Theft by Receiving Stolen Property, a third degree felony, in violation of Utah Code §76-6-408, and Burglary, a third degree felony, in violation of Utah Code §76-6-202, in the Third District Court, in and for Salt Lake County, State of Utah, the Honorable Charlene Barlow presiding.

TERESA L. WELCH (9554)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

WILLIAM M. HAINS (13724)
UTAH ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114

Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTRODUCTION 1

ARGUMENT..... 2

 I. Under Utah’s Crime Victim’s Restitution Act, a Victim is
 Entitled to Pecuniary Damages, Making the Victim Whole
 by Compensating the Victim for Actual, Demonstrable
 Losses2

 A. Retail value is not a proper restitution amount when it fails to
 reflect the actual, demonstrable losses sustained by the
 victim, when it constitutes a windfall for the victim, and when
 it constitutes pecuniary damages for the defendant 2

 B. Applying the replacement value of an item for a restitution
 award does not encourage further thefts 8

 C. The MSRP value did not constitute proper generalized
 restitution damages, but improper speculative and attenuated
 amounts 9

CONCLUSION 13

CERTIFICATE OF DELIVERY 14

CERTIFICATE OF COMPLIANCE 14

TABLE OF AUTHORITIES

Cases

<i>Cohn v. J. C. Penney Co.</i> , 537 P.2d 306 (Utah 1975).....	10
<i>Guess v. Montague</i> , 51 F.Supp. 61 (E.D. S.C. 1942).....	4, 8
<i>Jenkins v. Equipment Center, Inc.</i> , 869 P.2d 1000 (Utah Ct. App. 1994).....	3, 5, 6, 7, 9
<i>Jenkins v. Hesston</i> , 879 P.2d 266 (Utah 1994).....	3
<i>Mahana v. Onyx Acceptance Corp.</i> , 2004 UT 59, 96 P.3d 893	2, 8, 13
<i>Moore v. State</i> , 643 So.2d 2(1994).....	6
<i>People v. Chappelone</i> , 107 Cal.Rprt.3d 895, 905 (Cal. Ct. App. 2010)	11, 12
<i>People v. Jessee</i> , 222 Cal.App.4 th 501 (2013).....	7
<i>State v. Birkeland</i> , 2011 UT App 227, 258 P.3d 662	10
<i>State v. Brown</i> , 2009 UT App 285, 221 P.3d 273	2, 10
<i>State v. Corbitt</i> , 2003 UT App 417, 82 P.3d 211	3, 5
<i>State v. Hall</i> , 304 P.3d 677 (Kan. 2013).....	3, 4
<i>State v. Hight</i> , 2008 UT App 118, 182 P.3d 922, 923.....	6
<i>State v. Houston</i> , 2015 UT 40, 353 P.3d 55	8
<i>State v. Kayon</i> , 256 Wis.2d 577 (2002).....	7
<i>State v. Laycock</i> , 2009 UT 53, 214 P.3d 104	9
<i>State v. Ludlow</i> , 2015 UT App 146, 788 Utah Adv. Rep. 25	3, 4, 6, 7, 8, 12
<i>State v. Wadsworth</i> , 2015 UT App 138, 351 P.3d 826.....	7

Statutes

Utah Code §31A-23a-402.5.....	5
Utah Code §59-2-102	5
Utah Code §77-38a-102.....	3, 4, 10

Utah Code §77-38a-301.....2, 4, 9, 10

Other Authorities

INVESTIPEDIA, Manufacture’s Suggestive Retail Price-MSRP,
<http://www.investopedia.com/terms/m/manufacturers-suggested-retail-price-msrp.asp>
(last visited December 9, 2015) 11

Rules

Utah R. App. P. 24..... 1, 14

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

COLORADO STEVEN IRWIN,
Defendant/Appellant.

Case No. 20150217-CA

Appellant is not incarcerated.

INTRODUCTION

Mr. Irwin's opening brief argued that the trial court abused its discretion in awarding a restitution amount in excess of the replacement value of the watches. It argued that the improper restitution amount constituted a windfall for the victim and punitive damages against Mr. Irwin. It further argued that the restitution value was improperly based on lost opportunity costs, which were speculative and too attenuated from the criminal conduct. In response, the State contends that the trial court properly ordered the restitution amount as derived from the manufacturer's suggested retail price ("MSRP") of the watches. For the reasons set forth in the opening brief and in this reply brief, the State is incorrect. *See Utah R. App. P. 24 (c)* ("Reply briefs shall be limited to answering any new matter set forth in the opposing brief.").

ARGUMENT

I. Under Utah’s Crime Victim’s Restitution Act, a Victim is Entitled to Pecuniary Damages, Making the Victim Whole by Compensating the Victim for Actual, Demonstrable Losses.

The State is mistaken in its contention that the trial court properly ordered restitution in excess of the replacement value of the watches. In addition to the argument set forth in Appellant’s opening brief, the State is mistaken for the following reasons: (1) retail value is not a proper restitution amount when it fails to reflect the actual, demonstrable losses sustained by the victim, when it constitutes a windfall for the victim, and when it constitutes pecuniary damages for the defendant; (2) applying the replacement value of an item for a restitution award does not encourage further thefts; and (3) the MSRP value did not constitute proper generalized restitution damages, but improper speculative and attenuated amounts.

- A. Retail value is not a proper restitution amount when it fails to reflect the actual, demonstrable losses sustained by the victim, when it constitutes a windfall for the victim, and when it constitutes pecuniary damages for the defendant.

Utah’s Crime Victims Restitution Act (“the Act”) allows crime victims to be made whole by restoring them to the economic position that they were in before the crime occurred. Utah Code §77-38a-301; *see also Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶26, 96 P.3d 893. Furthermore, the Act only allows restitution awards for pecuniary damages, which is “*demonstrable economic injur[y]*” that could be recovered in a civil action with similar facts. *State v. Brown*, 2009 UT App 285, ¶10, 221 P.3d 273 (emphasis added); Utah Code § 77-38a-102(6). Case law in both Utah and nationwide makes clear that in making a victim whole, appropriate restitution awards should meet

certain objectives. A proper restitution amount must: (1) address actual, not speculative losses suffered by the victim; (2) not constitute a windfall for the victim; and (3) not constitute pecuniary damages against a defendant. *See Jenkins v. Equipment Center, Inc.*, 869 P.2d 1000, 1004 (Utah Ct. App. 1994), *cert. denied*, *Jenkins v. Hesston*, 879 P.2d 266 (Utah 1994); *State v. Hall*, 304 P.3d 677, 681 (Kan. 2013); *State v. Ludlow*, 2015 UT App 146, ¶6, 788 Utah Adv. Rep. 25; *see also* Utah Code § 77-38a-102(6). In meeting these objectives, the retail value of an item may or may not be the appropriate value to apply, depending upon the unique facts of each case. That is, using the retail value of an item in determining restitution is only appropriate to the extent that it meets these objectives. *See State v. Ludlow*, 2015 UT App 146, ¶13, 788 Utah Adv. Rep. 25; *see also State v. Corbitt*, 2003 UT App 417, ¶15, 82 P.3d 211; *Hall*, 304 P.3d 677, 681 (Kan. 2013).

The State argues that the retail value of an item is the general standard that should presumptively apply when determining the appropriate amount of restitution, and that once the State puts on evidence of an item's retail value, it then becomes the defendant's burden to prove why retail value should not be imposed. *See Appellee's Br. 6*, 16-17. Furthermore, the State argues that its burden was satisfied in this matter, and not adequately rebutted by Mr. Irwin. *See Appellee's Br. 16-17*. The State, however, is mistaken because: 1) it imposed the wrong standard for deciding appropriate restitution amounts; and 2) it misunderstood its burden and improperly shifted it to Mr. Irwin.

First, neither the Utah's Crime Victims Restitution Act nor Utah case law create a rebuttable presumption that the retail value of an item is the appropriate value to use

when determining restitution. Utah Code §77-38a-301; Utah Code § 77-38a-102(6). While the Act lists “fair market value” as a measure to be used to decide “pecuniary damages[,]” it does not provide a way to determine the fair market value of items. Thus, the Act does not specifically denote that the retail value (or wholesale value) of an item is the standard for “fair market value” that should presumptively apply when determining an appropriate restitution award. Utah Code § 77-38a-102(6). It is worth noting that Utah’s Restitution Act does not give any specific definition for “fair market value.” *Id.* This term, as it applies to restitution cases, has been defined under case law as “what the owner of the property could expect to receive, and the amount a willing buyer would pay.” *Ludlow*, 2015 UT App 146, at ¶6 (citation omitted) (internal quotation marks omitted). This is variable in practice because it depends upon who is buying, and who is selling. *Hall*, 304 P.3d 677, 681. For instance, a consumer will usually pay a higher price for an item than will a business entity (who can obtain the item for a whole sale price). *See Guess v. Montague*, 51 F.Supp. 61, 65 (E.D. S.C. 1942) (“[i]n commercial circles the terms retail and wholesale convey distinct and entirely different meanings. A retail price is the price that the ultimate consumer is expected to pay, and a wholesale price is that price which the retailer pays in the expectation of obtaining a higher price by way of profit from the ultimate consumer.”).¹

¹ While Utah’s Restitution Act does not statutorily define “fair market value,” this term is statutorily defined in different, unrelated sections of the Utah Code. Even in these sections, “fair market value” is not equated to being the retail value of an item. *See* Utah Code §59-2-102 (12) (“‘Fair market value’ means the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.

In addition, Utah case law does not create a rebuttable presumption in favor of retail value as the appropriate restitution value. Rather, Utah case law points out that the true measure of damage is flexible, allowing trial courts to fashion an equitable award to the victim that addresses the actual losses suffered by the victim. *See Jenkins v. Equipment Center, Inc.*, 869 P.2d 1000, at 1004 (stating “rules relating to the measure of damages are *flexible*, and can be *modified* in the interest of fairness” (emphasis added) (quotations omitted). *See also Corbitt*, 2003 UT App 417, ¶15 (“[t]he appropriate measure of the loss or damage to a victim is *fact-sensitive* and *will vary* based on the facts of a particular case.”) (emphasis added). In fact, this Court has suggested that it is against any sort of presumptive rule that would favor the retail price, purchase price, or wholesale price, etc. of an item as being determinative of the actual pecuniary losses suffered by a victim. *See State v. Corbitt*, 2003 UT App 417, ¶ 15, 82 P.3d 211, 215 (“We think it unwise to adopt a black-letter rule that either always requires or never permits the use of purchase price or insurance settlement amount as valuation methods under the restitution statute.”). Thus, Utah’s Restitution Act and case law do not list the retail value

For purposes of taxation, ‘fair market value’ shall be determined using the current zoning laws applicable to the property in question, except in cases where there is a reasonable probability of a change in the zoning laws affecting that property in the tax year in question and the change would have an appreciable influence upon the value.”); *see also* Utah Code §31A-23a-402.5 (9) (“For purposes of this section, ‘fair market value’ means what a knowledgeable, willing, and unpressured buyer would pay for a product or service to a knowledgeable, willing, and unpressured seller in the open market without any connection to other goods, services, including insurance services, or contracts, including insurance contracts, sold by the producer, consultant, or other licensee, or an officer or employee of the licensee.”).

of an item as being the presumptively correct restitution amount, and appropriately so, because this amount may not reflect the actual economic losses suffered by the victim.

See Jenkins, 869 P.2d 1000, 1004; *see also Ludlow*, 2015 UT App 146, at ¶9.²

Second, the State misunderstood and improperly shifted its burden in this matter. The State argued that it met its burden because it “presented *prima facie* evidence of the retail value of the stolen watches.” *See* Appellee’s Br. 19. The State also argued that Mr. Irwin failed to properly rebut this evidence. *See* Appellee’s Br. 16-17, 19. The State is mistaken about its burden. In determining a proper restitution amount, it is not the State’s burden to simply put on evidence of an item’s retail value. Rather, it is the State’s burden to put on proof of the victim’s actual losses. *See Ludlow*, 2015 UT App 146, at ¶13 (“[T]he State failed to meet its burden to demonstrate the appropriate amount of restitution”); *See also State v. Hight*, 2008 UT App 118, ¶ 3, 182 P.3d 922, 923 (“In determining the appropriate amount of restitution, trial courts are required to consider, inter alia, *the cost of loss to the victim.*”) (emphasis added); *Moore v. State*, 643 So.2d 2(1994) (In a restitution issue, “[t]he state attorney has the burden of showing, by a preponderance of the evidence, *the amount of loss* a victim has sustained as a result of a

² The State’s brief addresses a number of cases in Utah and outside jurisdictions that determined retail value as the appropriate restitution value to apply. *See* Appellee’s Br. 10-11. None of these cases, however, adequately support the State’s proposition that Utah Courts have applied a rebuttable presumption in favor of retail value when determining restitution amounts. Rather, the cases relied upon by both the State and Mr. Irwin ultimately indicate that the test for determining the restitution awards is one that is “flexible,” and one that should effectively compensate a victim for their actual losses, thus placing the victim in the position he would have been in had the crime not been committed. *See Jenkins*, 869 P.2d 1000, 1004. *See also Ludlow*, 2015 UT App 146, ¶¶6, 8.

crime and that the defendant caused the victim's loss.”) (emphasis added) (internal quotations omitted); *People v. Jesse*, 222 Cal.App.4th 501(2013) (“The burden is on the party seeking restitution to provide an adequate factual basis for the claim... Once the prosecution has made a prima facie showing of *the victim's loss*, the burden shifts to the defendant to demonstrate that the amount of loss is other than that claimed by the victim.”) (emphasis added) (internal quotations omitted); *State v. Kayon*, 256 Wis.2d 577 (2002) (In a restitution hearing, “the burden of *demonstrating loss* by the preponderance of the evidence shifts to the victim, *unless the court orders the district attorney to represent the victim.*”) (emphasis added and also in original).

Thus, if the State puts on evidence of an item's retail value, the State must then prove that the retail value does in fact reflect the victim's actual losses. *See Ludlow*, 2015 UT App 146, at ¶9. If the State cannot do so, then the retail value of the item is not the appropriate value to use for the restitution amount. Here, the State did not meet its burden in showing that the retail value of the watches reflected the actual losses suffered by the victim.

Here, the replacement value of the watches (\$13,651.40) represented the actual losses sustained by the victim. R.30-34; 85:11-13. *See State v. Wadsworth*, 2015 UT App 138, ¶13, 351 P.3d 826; *see also Jenkins* 869 P.2d at 1004. Prior to the burglary and theft, the victim business had 102 Rockwell watches. R.2. Making the victim whole for actual losses, therefore, required granting a restitution award that would allow the victim business to once again own 102 Rockwell watches. *See Wadsworth*, 2015 UT App 138, at ¶13. The replacement value would have allowed the victim to once again own 102

Rockwell watches and restore the victim to the economic position that the business was in prior to the commission of the crimes. *See Mahana*, 2004 UT 59, at ¶26. Furthermore, the State failed to present any evidence that the victim business could not reacquire 102 similar watches if given the replacement value of the watches. Because the victim was a business, and not a consumer, it is reasonable to assume that the victim could obtain the watches again for their replacement costs rather than the retail value of the watches. R. 84:14; *see also Guess v. Montague*, 51 F.Supp. 61, 65. The State failed to prove otherwise. Thus, it was not Mr. Irwin's burden to show why the retail value of the watches was inappropriate, but it was the State's burden to show why the retail value constituted the actual losses sustained by the victim. *See Ludlow*, 2015 UT App 146, at ¶¶11- 13. The State did not do so and instead improperly shifted its burden to Mr. Irwin.

B. Applying the replacement value of an item for a restitution award does not encourage further thefts

The State argues that the replacement value of the watches should not be awarded because it would incentivize additional thefts. *See Appellee's Br.* at 12-13. The State argues that "using replacement cost would effectively give thieves a wholesaler's discount, encouraging further thefts in lieu of legitimate retail purchases." *Id.* at 12. The State is mistaken. First, the proper means of deterring future criminal behavior is accomplished when judges employ traditional sentencing conditions such as incarceration, fines, and community service, etc. *See State v. Houston*, 2015 UT 40, ¶64, 353 P.3d 55. A trial judge is not prevented from imposing these types of sentencing

conditions to deter future criminal behavior when awarding the replacement value of an item as the appropriate restitution amount.

Second, while restitution does function as providing a deterrence, it does not justify the imposition of a discretionary financial obligation that exceeds the actual financial losses to the victim. *See State v. Laycock*, 2009 UT 53, ¶18, 214 P.3d 104. The State's reasoning would allow trial judges to impose arbitrary and excessive restitution amounts just for the sake deterring future criminal behavior. Thus, for good reason, Utah's Restitution Act and case law is clear that an appropriate restitution amount constitutes the actual, demonstrable financial losses sustained by the victim, and nothing more. Utah Code §77-38a-301; *see also Jenkins*, 869 P.2d 1000, 1004. As argued *supra* and in Mr. Irwin's opening brief, the replacement value of the watches is the appropriate restitution award because this amount reflects the actual losses to the victim.³

C. The MSRP value did not constitute proper generalized restitution damages, but improper speculative and attenuated amounts

Mr. Irwin's opening brief argued that the MSRP value was an improper restitution amount because it constituted a financial windfall for the victim and an unfair punitive

³ If this Court is persuaded by the State's argument that restitution awards should take into account whether they incentivize future problematic behavior, as opposed to focusing only on the actual losses sustained by a victim, then there is a similar type of argument to be made against always applying the MSRP value as the standard restitution award. That is, during times when market conditions are bad and consumer demand for items is low, a business would be incentivized to have extremely lax security measures in the hopes that their items would be stolen, especially if they knew that the MSRP value of an item would always be awarded by a trial judge. A struggling business would receive more money for their items from restitution awards than through actual retail sales. This hypothetical is meant to illustrate why restitution awards should not be based on the extent to which they incentivize problematic behavior from thieves or shopkeepers, but should only take into account the actual, demonstrable losses of a victim.

damage against Mr. Irwin. In response, the State argues that the MSRP value was appropriate because it reflected the general damages, in the form of loss opportunity costs, which were sustained by the victim business. Appellee's Br. 19-23. The State is mistaken because the MSRP value does not constitute proper general damages, but denotes an aspirational, speculative, and attenuated value as related to the actual sustained losses in this matter.⁴

General damages must necessarily be derived from the crime committed. *See Cohn v. J. C. Penney Co.*, 537 P.2d 306, 307 (Utah 1975) ("General damages are those which naturally and *necessarily result* from the harm done. They are damages which everybody knows are likely to result from the harm described and so are said to be implied in law.") (emphasis added). General damages, thus, do not constitute speculative and attenuated harms. In fact, Utah's Restitution Act is clear that that restitution is only awarded for demonstrable damages. Utah Code §§77-38a-301, 77-38a-102; *see also Brown*, 2009 UT App 285, at ¶10. In addition, Utah case law shows that when determining proper restitution amounts, "Utah has adopted a modified but for test to determine whether pecuniary damages *actually arise out of* criminal activities." *State v. Birkeland*, 2011 UT App 227, ¶11, 258 P.3d 662 (emphasis added) (internal quotation marks omitted). Here, the MSRP value did not represent proper general damages, nor did

⁴ The State argued that "Irwin did not present any evidence below challenging the accuracy of the MSRP as a measurement of retail price." *See* Appellee's Br. 16-17. To be clear, Mr. Irwin's argument against the MSRP value is that it does not reflect the *actual losses* of the business victim, and that it was the State's burden to show otherwise. This argument was preserved below. *See* R.85:4-5, 11-13.

it represent actual, demonstrable losses for the victim business that arose from Mr. Irwin's criminal conduct.

By definition, the MSRP value is an aspirational goal of what an item could sell for in a thriving economy with heightened consumer demand.⁵ Here, the State failed to put on any evidence that the victim business would or could have received the MSRP of the watches had they not been stolen. *See People v. Chappelone*, 107 Cal.Rprt.3d 895, 905, 910 (Cal. Ct. App. 2010). The State also failed to put on evidence that the victim business did not have comparable merchandise to sell its customers, or that the business was deprived of any watch sales whatsoever. *Id.* While the State points out on appeal that a letter attached to the victim impact statement identified the victim's business as a "watch company" that kept its watches in "locked display cases," this information falls extremely short of proving that the business victim suffered demonstrable lost opportunity costs that merited the restitution award of the MSRP value. *See Appellee's Br. 23.*

Rather than proving that the MRSP value reflected the actual, demonstrable losses sustained by the victim business, the State on appeal impermissibly shifts the burden to Mr. Irwin by arguing that Mr. Irwin failed to prove that the MSRP was not the

⁵ *See* INVESTIPEDIA, Manufacture's Suggestive Retail Price-MSRP, <http://www.investopedia.com/terms/m/manufacturers-suggested-retail-price-msrp.asp> (last visited December 9, 2015) (stating that MSRP value is "[t]he amount of money for which the company that produces a product recommends that it be sold in stores. *MSRP does not necessarily correspond to the price retailers actually use or to the price customers are willing to pay.* Retailers may need to set their prices below MSRP to move inventory, especially for items with low demand or in a sluggish economy.") (emphasis added).

appropriate amount. *See* Appellee's Br. at 19 ("While Irwin could have rebutted the MSRP evidence by presenting evidence of the watch market in Salt Lake County, the condition of the watches, or the retailer's sales history or that of nearby watch shops, he chose not to."). The State also maintains that it met its burden. *See* Appellee's Br. 30 ("The State has satisfied its burden to establish that the injury arose out of Irwin's criminal conduct by proving that the retailer owned the watches, that Irwin stole them, and that the watches were valued as being salable on the open market for \$39,004. Nothing more is needed here to prove that Irwin's theft deprived the retailer of that value.").

The State is mistaken because much more was needed here to prove that the MSRP value was the appropriate restitution amount. That is, the State fails to see that merely providing proof of the MSRP value of the watches is not the same thing as providing proof that the victim business would have received the MSRP value for the watches had the crime not occurred. *See Ludlow*, 2015 UT App 146, at ¶9; *see also Chappelone*, 107 Cal.Rprt.3d 895, 905, 910. Thus, the State does not see that it was the State's burden, and not Mr. Irwin's, to prove that the MSRP value reflected the actual, demonstrable losses sustained by the victim. *See Ludlow*, 2015 UT App 146, at ¶¶9, 11-13. Because the State did not meet this burden, the MSRP value was merely a speculative amount of what the watches were worth and not indicative of the actual, demonstrative losses sustained by the victim business. In this matter, the actual, demonstrable losses sustained by the victim was being deprived of 102 watches. The replacement costs adequately compensated the victim's losses because it allowed the victim to again

purchase 102 watches, thereby putting the victim in the same financial position the victim was in prior to the burglary. *See Mahana*, 2004 UT 59, at ¶26. Thus, the trial court erred in ordering a restitution award that exceeded the replacement costs of the watches.

CONCLUSION

For the reasons given above and in the opening brief, Mr. Irwin asks the Court to reverse the entry of the trial court's restitution order and find that the replacement value of the watches of \$13,651.40 is the appropriate restitution amount for this matter.

SUBMITTED this 18th day of December, 2015.



TERESA L. WELCH
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, TERESA L. WELCH, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 18th day of December, 2015.



TERESA L. WELCH

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 3,103 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.



TERESA L. WELCH

DELIVERED this 18 day of December, 2015.


