69729-3

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No. 69729-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN HARRIS, Jr.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **Mr. Harris's constitutional right to counsel was violated when the trial court denied his motion to discharge his court-appointed attorney based upon a breakdown in communication.**

Communication between the accused and his attorney is an essential component of the constitutional right to effective assistance of counsel. See Riggins v. Nevada, 504 U.S. 127, 144, 112 S. Ct. 1810, 118 L.Ed.2d 479 (1992); United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001). When the relationship between the defendant and appointed counsel collapses, the refusal to substitute new counsel violates the defendant's constitutional right to effective assistance of counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001); Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970). Thus, when a trial court learns of a conflict between a defendant and his counsel, the court must thoroughly inquire into the factual basis of the defendant's dissatisfaction. Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991). John Harris was unable to communicate with his court-appointed attorney, but his request for new counsel was denied without an adequate colloquy into the reasons for the breakdown in communication. He argues his constitutional right to effective

assistance of counsel was violated. Brief of Appellant at 6-14 (hereafter BOA).

In reviewing the denial of a defendant's request for substitute counsel, the reviewing court considers (1) the adequacy of the trial court's inquiry into the conflict; (2) the extent of the conflict between the accused and his attorney, and (3) the timeliness of the motion. Stenson, 142 Wn.2d at 724; Daniels v. Woodford, 428 F.3d 1181, 1197-98 (9th Cir. 2005), cert. denied, 550 U.S. 968 (2007).

The State recognizes but provides little analysis of these factors. Brief of Respondent at 7-15 (hereafter BOR). Instead, the State argues that this Court's review instead focuses on the lawyer's performance at trial. BOR at 8. The State's position is incorrect. The State relies upon Stenson, but the Stenson Court followed federal precedent that examined "both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives." Stenson, 142 Wn.2d at 724.

The State also argues that the record does not support Mr. Harris's claim that he could not communicate with his attorney. BOR at 7, 13. The record, however, shows that Mr. Harris clearly told the

presiding judge that he could not communicate with his court-appointed attorney. 6/19/12 RP 21.

> The Court: Okay, Mr. Harris, I'll hear from you.
>
> Mr. Harris: Well, Your Honor, uh, we just – I just had one trial and we had some misunderstandings, and it'd been – I got two other trials, and I can't go in there with – with not – not having an understanding with this man.
>
> The Court: I don't know what that means, "not having an understanding."
>
> Mr. Harris: Well, we're not able to communicate, Your Honor.
>
> [Attorney/client discussion, off the record]
>
> The Court: All right. All right, anything else you want to say?
>
> Mr. Harris: No, Your Honor.

6/19/12 RP 21.

Mr. Harris expressed his problem with his attorney clearly, but the court did not ask the "specific and targeted questions" that would provide needed information about the inability to communicate. United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2001). Mr. Harris cannot be faulted if he was not articulate enough to explain the problems. See People v. Marsden, 2 Cal.3d 118, 465 P.2d 44, 48, 84 Cal.Rptr. 156 (1970) (reversing denial of motion for

substitute counsel when defendant not permitted to document his contentions and stating that "[t]he semantic employed by a lay person in asserting a constitutional right should not be given undue weight in determining the protection to be accorded that right."). It was Judge Kessler's responsibility to inquire into the reasons Mr. Harris and his attorney were unable to communicate. Had the court done so, this Court would have the record the State claims is necessary.

The State also argues that Mr. Harris's inability to communicate with his lawyer was not as dramatic as that in several federal cases or in Stenson. BOR at 9-11 (citing Brown, 424 F.2d at 1169-70; United States v. Williams, 594 F.2d 1258, 1259-60 (9th Cir. 1979); and Frazier v. United States, 18 F.3d 778, 783 (9th Cir. 1994)). In Mr. Harris's case, however, the nature of the conflict is unknown due to the lack of a colloquy. In contrast, the trial court in Stenson had two separate in camera discussions with the defendant and his attorney concerning the reasons Stenson wanted a new attorney and why the attorney later wanted to withdraw from the court. Stenson, 142 Wn.2d at 726, 728-29. An adequate colloquy in this case similarly would have revealed the source and nature of Mr. Harris's conflict with his attorney.

Finally, the State correctly points out that Mr. Harris's letter to Judge Linde explaining his dissatisfaction with his public defender was not before Judge Kessler. BOR 14. The letter, however, reveals what Mr. Harris would have said given a genuine colloquy. In it, Mr. Harris related that not only was he unhappy with his public defender, he believed his lawyer was working for the prosecutor, not for him. CP 123. In determining if Mr. Harris was unable to communicate with his attorney, the reviewing court may look at other portions of the record. See Brown, 424 F.2d at 1169 (looking at the defendant's statement during trial in reviewing denial of pre-trial motions for a new attorney); BOR at 12-13 (asking this Court to review trial record in addressing Mr. Harris's pre-trial motion for new counsel). Mr. Harris's letter to Judge Linde is thus instructive and properly before this Court.

A defendant's Sixth Amendment right to counsel is violated when he is "'forced into trial'" with the assistance of a lawyer with whom he is dissatisfied and cannot communicate." Nguyen, 262 F.3d at 1003-04 (quoting Brown, 424 F.2d 1169). The trial court denied Mr. Harris's timely motion for a new attorney without an adequate colloquy, and he was forced to go to trial with a lawyer with whom he could not communication. For the reasons stated above and in his

opening brief, Mr. Harris asks this Court to reverse his convictions and remand for a new trial with new counsel.

2. **The trial court exceeded its statutory authority in ordering Mr. Harris to pay restitution for burial expenses incurred by Ms. Grayson's family as part of his sentence for driving with a suspended driver's license.**

As a condition of his sentence for driving with a suspended or revoked operator's license, the court ordered Mr. Harris to pay restitution of $8,655.22 to reimburse Clashana Grayson's family members for burial and memorial expenses. CP 61-62, 91-105. Mr. Harris argues that the burial expenses were not authorized by statute and were not a loss caused by driving with a suspended license. BOA at 14-25.

a. Restitution to Ms. Grayson's relatives was not authorized by RCW 9A.20.030. Restitution may only be ordered as provided by statute. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). This Court conducts de novo review of the trial court's authority to impose restitution. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). The State now agrees with Mr. Harris that restitution is not authorized by RCW 9.92.060 or RCW 9.95.210. BOR at 16-17. The

State, however, asserts that the court's restitution order was authorized by RCW 9A.20.030(1). Id. at 17-18.

RCW 9A.20.030 permits a court to order restitution as an alternative to a fine. It reads, in relevant part:

> If a person has gained money or property or caused a victim to lose money or property through the commission of a crime, upon conviction thereof . . . the court, in lieu of imposing the fine authorized for the offense under RCW 9A.20.020, may order the defendant to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain or victim's loss from the commission of the crime. Such amount may be used to provide restitution to the victim at the order of the court. . . . For purposes of this section, the terms "gain" or "loss" refer to the amount of money or the value of the property or services gained or lost.

Id. (emphasis added). The plain language of the statute thus authorizes restitution if the defendant has caused a victim to lose money or property as the result of his offense. It does not authorize restitution to a victim's relatives.

Instead of addressing the statute's language, the State relies upon a Division Two decision to argue that the statue authorizes the sentencing court to order the defendant to pay for "'the actual amount of loss caused by the crime to any person damaged; neither the name of the crime nor the named victims limit the award.'" BOR at 17 (quoting State v. Thomas, 138 Wn. App. 78, 83, 155 P.3d 998 (2007)) (emphasis

omitted). The Thomas Court, however, made this assertion based upon cases interpreting RCW 9.95.210(2) and RCW 9.92.060(2), not RCW 9A.20.030. Thomas, 138 Wn. App. at 83 (citing State v. Barr, 99 Wn.2d 75, 78-79, 658 P.2d 1247 (1983) (applying RCW 9.95.210(2)) and State v. Rogers, 30 Wn. App. 653, 656-57, 638 P.2d 89 (1981) (applying RCW 9.92.030(2)). Both of these statutes permit the court to order the defendant "to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question." RCW 9.95.210(2); RCW 9.92.060(2) (emphasis added). This language is different from RCW 9A.20.030(1) which permits restitution to "a victim" who has lost "money or property through the commission of a crime."

Cases addressing the restitution provisions of the Sentencing Reform Act (SRA) are also not helpful in interpreting RCW 9A.20.030 because the SRA also provides a much broader authority for restitution. See State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999) (in enacting restitution provisions of SRA, Legislature granted "broad power" to the trial court to order restitution). Under the SRA, the court may must impose restitution for any offense "which results in injury to any person or damage to or loss of property." RCW 9.94A.753(5)

(emphasis added). It is not limited to crime victims, as is RCW 9A.20.030. State v. Kinneman, 155 Wn.2d 272, 287, 119 P.3d 350 (2005). In addition, the SRA broadly defines "victim" to include "any person who has sustained emotional, psychological, physical, or financial injury to person or property as the direct result of the crime charged." RCW 9.94A.030(53). Chapter 9A.20 RCW contains no such definition.

RCW 9A.20.030 authorizes the superior court to award restitution "to the victim" when the defendant "caused a victim to lose money or property." RCW 9A.20.030(1). Ms. Grayson's family members were not victims of the crime of driving with a revoked driver's license. Nor did Ms. Grayson lose money or property as a result of the offense. The order requiring Mr. Harris to pay restitution to Ms. Grayson's family members as part of his sentenced for driving with a suspended or revoked driver's license exceeded the trial court's statutory authority.

b. The State did not prove that the restitution was causally connected to the crime of driving with a suspended or revoked operator's license. Restitution must be causally connected to the crime for which the offender is being sentenced. See Griffith, 164 Wn.2d at

965-66 (interpreting former RCW 9.94A.142); Thomas, 138 Wn. App. at 82-83 (restitution award must be based upon crime for which defendant convicted); State v. Hartwell, 38 Wn. App. 135, 138-41, 684 P.2d 778 (1984) (interpreting SRA and RCW 9.95.210), overruled on other grounds, State v. Krall, 125 Wn.2d 146, 882 P.2d 1040 (1994). The State had the burden of proving restitution by a preponderance of the evidence. Griffith, 164 Wn.2d at 965; Thomas, 138 Wn. App. at 83.

The Thomas Court found such a causal connection between the defendant's crime of driving while under the influence of alcohol and the injuries her passenger incurred as the result of an accident. Thomas, 138 Wn. App. at 84. The State mistakenly argues that Thomas is similar to Mr. Harris's case. BOR at 18-20. The defendant in Thomas was charged with vehicular assault. Her passenger testified that the defendant was driving "fast," and the State produced expert testimony that the defendant caused the accident in which the passenger was injured. Id. at 80. At the restitution hearing, the court found by a preponderance of the evidence that that the defendant's intoxication was one of the causes of the automobile accident. Thomas, 138 Wn. App. at 81.

In contrast, there is no evidence that Mr. Harris caused the accident that resulted in Ms. Grayson's death. Ms. Grayson was crossing a busy street in the dark without using the marked cross-walk. The judge who ordered restitution had not presided over Mr. Harris's trial and could not make a factual finding. Instead, the court simply stated that "the but for standard, which is the law of our state, is sufficient to impose restitution in this case." 6/11/13 RP 15.

The State did not produce an accident reconstruction specialist to show that Mr. Harris caused the accident. Contrary to the state's assertion in a footnote, the jury did not find beyond a reasonable doubt "that Harris caused Grayson's death." BOR at 2, 20 n.8 (citing CP 51). Instead, the jury found that Mr. Harris was "involved in an accident that resulted in the death of another person." CP 51. Neither the jury nor the court imposing restitution found that Mr. Harris caused the accident.

Thomas does not hold that a conviction for driving while under the influence is per se sufficient to permit restitution for an accident victim's injuries. Instead, there must be evidence that the use of alcohol was a cause of the accident. Thomas, 138 Wn. App. at 83. The State did not prove by a preponderance of the evidence that Mr. Harris or his

lack of a driver's license caused the accident, and his case is thus easily distinguished from Thomas.

The fact that Mr. Harris did not have a driver's license does not establish that he was driving recklessly or negligently and therefore caused the accident. Had Mr. Harris been involved in personal injury suit resulting from the accident, evidence that his license was revoked would probably have been excluded as irrelevant to the issues before the jury. Kappelman v. Lutz, 167 Wn.2d 1, 9, 217 P.3d 286 (2009) (evidence that driver did not have motorcycle endorsement properly excluded in suit for damages resulting from passenger's injury in accident that resulted when the motorcycle hit a deer); Mills v. Park, 67 Wn.2d 717, 720-21, 409 P.2d 646 (1966) (evidence that defendant did not have a driver's license properly excluded in absence of evidence of causal connection between lack of license and negligence); Weihs v. Watson, 32 Wn.2d 625, 629, 203 P.2d 350 (1949) (whether driver had license to drive truck irrelevant to whether he operated truck in negligent manner); see State v. Lopez, 93 Wn. App. 619, 623, 970 P.2d 765 (1999) (juvenile's lack of driver's license or driver's education was not admissible to show disregard for safety of others in prosecution for vehicular homicide).

For example, in Holz v. Burlington Northern R. Co., 58 Wn. App. 704, 705, 794 P.2d 1304 (1990), a 16-year-old was killed when he unknowingly drove a motorcycle into railroad car that was straddling an unlit county road. The trial court excluded evidence that the boy did not have a motorcycle license. Id. This Court upheld the trial court's balancing of the probative value and unfair prejudice of the evidence, noting that the lack of a proper license is normally irrelevant in wrongful death action. Id. at 708. Similarly, the fact that Mr. Harris did not have a driver's license is not the cause of the accident, and the family member's financial losses were not causally connected to the crime.

Restitution in Washington must be based upon a causal connection between the offender's crime and the victim's losses. Griffith, 164 Wn.2d at 695. In some cases, the courts have used the "but for" test to determine the causal connection. Id. at 966; State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). The State argues the restitution order should be upheld because Mr. Harris would not have struck Ms. Grayson if he had not been driving his car and therefore "Harris's commission of the crime is a 'but for' cause of Grayson's death." BOR 19-20, 22.

The accident, however, would have occurred if Mr. Harris had been driving with a valid license. The State presented no evidence that Mr. Harris's lack of a valid operator's license contributed to the accident. Ms. Grayson was jaywalking across a busy street at night when Mr. Harris unfortunately struck her with his car. There is no causal connection between Mr. Harris's lack of a driver's license and Ms. Grayson's death.

In the appellant's brief, Mr. Harris referred this Court to a helpful Florida Supreme Court case holding that driving with a suspended operator's license does not necessarily support a restitution order for injuries incurred during a traffic accident, State v. Schuette, 822 So.2d 1275 (Fla. 2002). BOA at 20-22. The State argues that the Schuette reasoning is not applicable because Florida does not use the "but for" test for causation. BOR at 20-22. The State is incorrect.

Florida interprets its broad restitution statue to permit restitution if the State proves both a "but-for" connection and that the loss bears a "significant relationship to the offense."[1] Schuette, 822 So.2d at 1282

[1] The Florida restitution statute mandates restitution for any damage or loss caused "directly or indirectly" by the defendant's offense or the defendant's criminal episode unless there are clear and compelling reasons not to order restitution. Fla.Stat.Ann. § 775.089(1)(a). The statute also specifically defines "victim" to include "each person" who suffers loss, injury or death as the "direct or indirect" result of the offense. Fla.Stat.Ann. § 775.089(2)(c).

(State must prove both "but for" causation and a "significant relationship"); State v. Glaubius, 688 So.2d 913, 915 (Fla. 1997). (upholding award of investigative costs as restitution "because 'but for' Glaubius' criminal misconduct, no investigation would have occurred."). Even if Washington does not use the words "significant relationship" to describe the required causal connection between the offense and the victim's loss, the Schuette Court's analysis remains instructive:

> Although it is undisputed that Schuette was driving illegally by driving with a suspended license, the State failed to present any evidence of a relationship – much less prove by a preponderance of the evidence – to establish that the accident and resulting damages were caused by, or related to, Schuette's act of driving without a license.

Schuette, 822 So.2d at 1283.

The State did not prove by a preponderance of the evidence that Mr. Harris's driving with a suspended or revoked operator's license caused the accident. The restitution was not causally connected to Mr. Harris's crime, and "but for" Mr. Harris's suspended license, the accident still would have occurred.

c. The restitution order must be vacated. Mr. Harris was convicted of driving with a suspended or revoked driver's license. RCW 9A.20.030 did not authorize the trial court to order Mr. Harris to pay Ms. Grayson's relatives for her burial expenses. In addition, the relative's financial losses were not causally related to Mr. Harris's offense. The restitution order must be vacated. Hartwell, 38 Wn. App. at 141.

B. CONCLUSION

Mr. Harris's constitutional right to counsel was violated when the trial court denied his motion for substitute counsel without inquiring into the reasons for his dissatisfaction with his court-appointed attorney. For the reasons stated above and in the Brief of Appellant, Mr. Harris's convictions for felony hit and run driving and driving with a suspended or revoked driver's license must be reversed and remanded for a new trial with new counsel.

In the alternative, the order requiring Mr. Harris to pay restitution as a condition of his sentence for driving with a suspended or revoked operator's license must be vacated because (1) the trial court lacked the statutory authority to order restitution, and (2) the family's damages were not causally connected to Mr. Harris's crime.

DATED this 28th day of January 2014.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. JOHN HARRIS, JR., Appellant.	)))))))))	NO. 69729-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] ANDREA VITALICH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JANUARY, 2014.

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