No. 90752-8

(Court of Appeals No. 69729-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN HARRIS, Jr.,

Petitioner.

PETITION FOR REVIEW

ELAINE L. WINTERS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washngton Court of Appeasls Decisions

United States Supreme Court Decisions

United States Circuit Court of Appeasl Decisions

United States Constitution

Washington Constitution

Washington Statutes

Washington Court Rule

Other Authority

A. IDENTITY OF PETITIONER

John Harris Jr., defendant and appellant below, seeks review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Harris seeks review of the Court of Appeals decision affirming his King County Superior Court convictions for leaving the scene of an accident resulting in death and driving with a suspended or revoked driver's license and an order requiring Mr. Harris to pay restitution. State v. John Harris, Jr., ___ Wn. App. ____, 327 P.3d 1276 (2014).

A copy of the Court of Appeals decision, dated June 23, 2014, is attached as Appendix A. A copy of the Order denying Mr. Harris' motion for reconsideration, dated July 24, 2014, is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant's constitutional right to counsel is violated when he is forced to proceed with an attorney with whom he has an irreconcilable conflict, such as a breakdown in communication. U.S. Const. amends. VI, XIV; Const. art. I § 22. When the defendant asks to discharge his court-appointed attorney, the court must inquire into the nature and extent of the purported conflict. Mr. Harris asked to discharge his attorney before omnibus hearing due to his inability to communicate with the lawyer, who had represented him in a prior trial. The court,

however, denied the motion after asking Mr. Harris only two questions and without posing any questions of Mr. Harris' attorney. Was Mr. Harris' constitutional right to counsel was violated when the court denied his request for a new attorney?

2. The defendant has the constitutional rights to be present at his own trial and to a public trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The public also has the right to access to the judicial system. U.S. Const. amend. I; Const. art. I, § 21. During jury selection, the court met with the lawyer in chambers to discuss challenges for cause and re-starting jury selection with the remaining and new jurors. Were Mr. Harris' constitutional rights to be present and/or to a public trial violated?

3. After he was involved in an automobile accident that resulted in the death of another person, Mr. Harris was ordered to pay restitution to the accident victim's family for her burial expenses as condition of his sentence for driving with a suspended operator's license.

a. Restitution may only be ordered for a victim's damages or losses that are causally connected to the crime for which the defendant is sentenced. Were the burial expenses causally connected to the offense of driving with a suspended operator's license?

b. Restitution may be imposed as authorized by statute. RCW 9A.20.030 only authorized the court to order restitution to reimburse

crime victims for the loss or money or property. Did the trial court lack authority to order Mr. Harris to pay restitution to the relatives of the accident victim?

D. STATEMENT OF THE CASE

John Harris, Jr., was convicted of (1) leaving the scene of an accident that resulted in death, RCW 46.52.020(1), and (2) driving with a suspended or revoked driver's license, RCW 46.20.342(1)(b). CP 49-51. The automobile accident occurred when Clashana Grayson attempted to jaywalk across East Marginal Way on a dark evening. 2RP 200-01, 224; 3RP 262; 4RP 581; 5RP 670; 6/11/13 RP 6. East Marginal Way is several lanes wide at that point, and cars travel fast on the roadway, often over the speed limit. 2RP 223; 3RP 265-66.

Mr. Harris did not see Ms. Grayson crossing the street before he hit her. 4RP 572, 575; 6RP 765. He stopped his car and called for someone to call 911, but then panicked and left. 2RP 210-11; 6RP 766-79, 783-84. Mr. Harris' driver's license was revoked. 5RP 691. After obtaining counsel, Mr. Harris went to the police station, gave a recorded statement, and gave the police the automobile he was driving that evening. 3RP 346-48, 358-60; 6RP 772-73, 799.

Four or five people who noticed the accident ran to Ms. Grayson and tried to protect her from on-coming traffic. 2RP 203-04, 229; 3RP

275. They were unable to divert a silver car that ran over Mr. Grayson as she lay in the roadway; the driver did not stop. 2RP 203-04, 229, 234; 3RP 258; 5RP 564, 660, 673.

Ms. Grayson died later that evening at a local hospital. 2RP 259; 3RP 341-42; 4RP 455. The medical forensic pathologist opined that Ms. Grayson's most serious injuries were consistent with an upright pedestrian being hit by an automobile. 4RP 512, 528. However, he could not rule out the possibility that the fatal injuries were caused when the second car drove over her. 4RP 522, 536.

On appeal, Mr. Harris challenged the denial of his pre-trial motion for substitute counsel and the imposition of restitution to Ms. Grayson's family members and friends for her burial and memorial expenses as a condition of his sentence for driving with a suspended driver's license. In his Statement of Additional Grounds for Review, Mr. Harris argued that his constitutional rights to be present and to a public trial were violated when the court and lawyers addressed for-cause juror challenges and the need for additional prospective jurors in the judge's chambers.

The Court of Appeals affirmed Mr. Harris' convictions and the restitution order without addressing the public trial issue. Mr. Harris now seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **Mr. Harris' constitutional right to counsel was violated when the trial court denied his motion to discharge his court-appointed attorney without a sufficient inquiry into the reasons for the request.**

Communication between a client and his attorney is an essential component of the right to counsel. See Riggins v. Nevada, 504 U.S. 127, 144, 112 S. Ct. 1810, 118 L.Ed.2d 479 (1992) (Kennedy, J., concurring) Geders v. United States, 425 U.S. 80, 91, 96 S. Ct. 1330, 47 L.Ed.2d 592 (1976); U.S. Const. amends. VI, XIV; Const. art. I, § 22. The right to counsel is thus violated when a defendant is forced to proceed with an attorney with whom he has an irreconcilable conflict or with whom he cannot communicate. State v. Thompson, 169 Wn. App. 436, 463, 290 P.3d 966 (2012), rev. denied, 176 Wn.2d 1023 (2013); Daniels v. Woodford, 428 F.3d 1181, 1197 (9th Cir. 2005), cert. denied, 550 U.S. 968 (2007); United States v. Nguyen, 262 F.3d 998, 1003-04 (9th Cir. 2001). This Court should accept review because the denial of Mr. Harris' requests for new counsel violated his right to effective assistance of counsel. RAP 13.4(b)(3).

The trial court is obligated to conduct a thorough inquiry when a defendant is dissatisfied with court-appointed counsel. Thompson, 169 Wn. App. at 462; State v. Dougherty, 33 Wn. App. 466, 471, 655 P.2d

1187 (1982), rev. denied, 99 Wn.2d 1023 (1983); Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991); Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure § 11.4(b) at 700-02 (3rd ed. 2007). As the Court of Appeals stated in Thompson:

> A court learning of a conflict between defendant and counsel has an obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction. Such an inquiry must provide a sufficient basis for reaching an informed decision. The court may need to evaluate the depth of any conflict between defendant and counsel, the extent of any breakdown in communication, how much time may be necessary for a new attorney to prepare, and any delay or inconvenience that may result from substitution.

Thompson, 69 Wn. App. at 462 (quotation marks omitted) (emphasis added). In reviewing the denial of a defendant's motion for new counsel, an appellate 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. In re Personal Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001); Thompson, 169 Wn. App. at 462; Daniels, 428 F.3d at 1197-98.

Mr. Harris made a timely motion for new counsel prior to his omnibus hearing. The presiding criminal judge asked Mr. Harris only two questions, and the hearing lasted less than two minutes. 1RP 20-21. Mr. Harris told the court that he had already been through one trial with his

attorney and he and counsel had "misunderstandings" and could not communicate. 1RP 21. The Court of Appeals summarily excused the trial court's failure to thoroughly question Mr. Harris, reasoning that in three cases cited by Mr. Harris, there was "significant evidence on the record of a breakdown in the attorney-client relationship" before the defendant made his request for substitute counsel. Slip Op. at 8. The Court of Appeals published decision thus condones the lack of a meaningful inquiry and placed the burden of relating problems without counsel entirely on the indigent defendant.

"[I]n most circumstances, a court can only ascertain the extent of the breakdown in communication by asking specific and targeted questions." United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2001). The inquiry thus should include questioning the attorney or the defendant "privately and in depth" and examining available witnesses.[1] Nguyen, 262 F.3d at 1004 (quoting United States v. Moore, 159 F.3d 1154, 1160 (9th Cir. 1998)). Earlier, Mr. Harris had asked the court in his other case to grant substitute counsel. Mr. Harris related that he believed his attorney was working for the prosecutor's office because the lawyer did not obtain missing discovery and that his attorney did not call any

[1] Such an inquiry may also "ease the defendant's dissatisfaction, distrust, and concern." Adelzo-Gonzalez, 268 F.3d at 777.

witnesses on his behalf. CP 123-24 Probing questions by the presiding judge would have revealed this and possibly other problems in the attorney-client relationship that negatively impacted Mr. Harris' right to effective assistance of counsel.

The trial court violated Mr. Harris' constitutional right to counsel by denying his motion for new counsel and forcing Mr. Harris to proceed to trial with an attorney he believed was working for the prosecutor. This Court should accept review of this important constitutional issue. RAP 13.4(b)(3).

2. **Mr. Harris's constitutional rights to be present and to a public trial were violated when the court and counsel discussed jury selection in chambers.**

During jury selection, the judge and attorneys engaged in an off-the-record discussion in the court's chambers. In his Statement of Additional Grounds for Review, Mr. Harris pointed out that the procedure violated his constitutional right to be present and to a public trial. The Court of Appeals concluded that Mr. Harris's constitutional right to be present was not violated because "no decisions were made during the brief chambers conference" but did not address the public trial issue. Slip Op. at 8-9. The Court of Appeals decision concerning Mr. Harris' right to be present is in conflict with this Court's decision in State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011). RAP 13.4(b)(1). This Court should also grant

review to address the important constitutional issue of whether the right to a public trial was violated. RAP 13.4(b)(3).

A person accused of a crime has the fundamental constitutional right to be present for all critical stages of the proceedings. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); Irby, 170 Wn.2d at 880-81. The jury selection process in a critical stage in the proceedings. Irby, 170 Wn.2d 874.

The jury selection process in Mr. Harris's case began when the first prospective jurors were sworn on November 14. 11/14-11/15/12 RP 12; Irby, 170 Wn.2d at 884. It included the in-chambers conference where counsel and the judge discussed excusing jurors for cause and re-starting the jury selection process with additional prospective jurors. Irby, 170 Wn.2d at 884 (jury selection included emails between judge and counsel about "potentially dismissing 10 jurors"). As in Irby, Mr. Harris was not present for the in-chambers discussion, and his constitutional right to be present was therefore violated. Id. at 884, 885.

The Court of Appeals held that Mr. Harris had no right to be present because no decisions were made. Slip Op. at 9. The parties, however, discussed challenges for cause and whether to restart the jury selection process with additional jurors. 1RP 154-56; 11/14-11/15/12 RP

43, 53; This Court should accept review because the Court of Appeals decision is in conflict with Irby. RAP 13.4(b)(1).

In addition, Mr. Harris argued that his constitutional right to a public trial was violated by the in-chambers conference, but the Court of Appeals did not address the right to a public trial in its opinion. SAG at 2, 5-9; Slip Op. at 8-9. As a defendant in a criminal case, Mr. Harris had the right to a public trial, and the public had a vital interest in the open administration of justice. U.S. Const. amends. I, VI; Const. art. I, §§ 21, 22.

Mr. Harris's constitutional right to a public trial included the right to public access to jury selection. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Sublett, 176 Wn.2d 58, 71-72, 292 P.3d 175 (2012); State v. Wise, 176 Wn.2d 1, 11-12, 288 P.3d 1113 (2013); In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). This Court should also accept review to address the constitutional issue ignored by the Court of Appeals. RAP 13.4(b)(3).

3. **The trial court exceeded its statutory authority in ordering Mr. Harris to pay restitution for burial expenses 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 the hit and run victim's family members for burial and memorial expenses.[2] CP 61-62, 91-105. No other reported Washington cases authorize the imposition of restitution for the crime of driving with a suspended driver's license. This court should accept review to address the Court of Appeals conclusions that Mr. Harris's driving was the "but for" cause of the expenses and that RCW 9A.20.030 authorized the award of restitution to family members.

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). Because Mr. Harris was convicted of a misdemeanor, restitution was governed by RCW 9A.20.030(1), not the SRA. RCW 9A.20.030 permits a court to order restitution as an alternative to a fine in order to compensate a crime victim for the loss of money or property.

> 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. . .

[2] The State did not request restitution for the hit and run conviction based upon Hartwell, 138 Wn. App. at 138-41. CP 78.

> 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).

In Washington 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); State v. Thomas, 138 Wn. App. 78, 82-83, 155 P.3d 998 (2007) (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 Court of Appeals held that funeral expenses were causally connected to driving with a suspended driver's license utilizing the "but for" test. Slip Op. at 4-7. The court reasoned that Mr. Harris's driving caused Ms. Grayson's death because "on the night of the accident, he should not have been driving at all." Slip Op. at 7. The accident, however, was caused because Ms. Grayson jaywalked across a busy street at night while wearing dark clothing. It would have occurred even if Mr. Harris had been licensed to drive.

Mr. Harris' case is in contrast to the restitution order in a driving while under the influence of alcohol for injuries the defendant's passenger incurred as the result of an accident upheld in Thomas, supra. The defendant was charged with vehicular assault but convicted of driving while under the influence of alcohol. At trial 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 Mr. Harris' case, there is no jury finding that Mr. Harris caused the accident that resulted in Ms. Grayson's death. The judge who ordered restitution had not presided over Mr. Harris's trial and 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. Unlike Thomas, 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.

Mr. Harris' positon is consistent with Washington cases holding that the status of a party's driver's license is irrelevant in a personal injury suit resulting from a motor vehicle accident. 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).

The Court of Appeals also rejected Mr. Harris' argument that the plain language of RCW 9A.20.030(1) does not authority the imposition of restitution to family members. The SRA provides broad authority for restitution. See State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). 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). 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).

RCW 9A.20.030, however, 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). The plain meaning of "victim"

RCW 9A does not include family members. This Court should accept review of this important issue of statutory construction. RAP 13.4(b)(4).

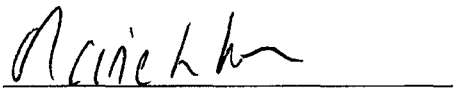
Numerous citizens are convicted of driving with suspended driver's license in superior, district and municipal courts throughout the State. The published opinion in Mr. Harris' case permits the imposition of restitution upon any driver involved in an automobile accident whose license is suspended or revoked whether or not the driver was at fault. This Court should accept review of this important issue. RAP 13.4(b)(4).

F. CONCLUSION

John Harris asks this Court to accept review of the Court of Appeals decision affirming his convictions and the imposition of restitution.

DATED this 25th day of August 2014.

Respectfully submitted,



Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Petitioner

APPENDIX A

COURT OF APPEALS DECISION TERMINATING REIVEW

June 23, 2014

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN HARRIS, JR., Appellant.	No. 69729-3-I DIVISION ONE PUBLISHED OPINION FILED: June 23, 2014

BECKER, J. — Statutory restitution may be ordered under RCW 9A.20.030(1) if the State proves that the crime was a "but for" cause of the victim's loss. Washington does not require proof of proximate cause as that term is used in tort law. In this case, the loss was burial expenses for a woman who died after appellant John Harris ran into her with his car. Harris was driving with a suspended license at the time and was convicted of that crime. Harris should not have been driving, and if he had not been driving, he would not have hit the pedestrian. We conclude driving with a suspended license was a "but for" cause of the loss and affirm the order of restitution.

The accident occurred at night in Tukwila on East Marginal Way, a busy arterial passing through an industrial area. Pedestrian Clashana Grayson, wearing dark clothing, had just gotten off the bus and was crossing mid-block. Harris ran into her, stopped, got out to check on her, saw that she was lying

motionless in the street, and left the scene. Bystanders ran to help Grayson, but another car ran over her before they were able to block traffic. Grayson died at the hospital. The driver of the second car was not identified.

The State did not charge Harris with vehicular homicide. That would have required substantial evidence, which apparently was lacking, that Harris was driving recklessly, under the influence of alcohol or drugs, or with disregard of others. RCW 46.61.520. Instead, the State charged Harris with felony hit-and-run and driving with a suspended license. A jury convicted Harris as charged. In a special verdict, the jury determined that Harris was "involved in an accident that resulted in the death of another person." See RCW 46.52.020(4)(a)-(b) (hit-and-run resulting in death is a class B felony; hit-and-run resulting in injury is a class C felony). Harris was sentenced to a total of 87 months' imprisonment.

At the State's request, the court ordered Harris to pay restitution of $8,655.22 to the decedent's relatives for her burial expenses. The order of restitution was part of the sentence for driving with a suspended license. The State did not seek restitution on the conviction for felony hit-and-run, recognizing that the burial expenses were not causally connected to that offense under Washington case law. See State v. Hartwell, 38 Wn. App. 135, 684 P.2d 778 (1984), overruled on other grounds, State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994).

Harris appeals the order of restitution.

A court's power to impose restitution is statutory. State v. Thomas, 138 Wn. App. 78, 81, 155 P.3d 998 (2007). Harris contends the order of restitution

for the burial expenses must be vacated because it was not authorized by statute.

Restitution is an integral part of the Washington system of criminal justice. Restitution statutes indicate a strong public policy to provide restitution whenever possible. State v. Shannahan, 69 Wn. App. 512, 517-18, 849 P.2d 1239 (1993). We will reverse an award of restitution only if the court abused its discretion, so long as the restitution is of a type authorized by statute. Thomas, 138 Wn. App. at 81. A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Thomas, 138 Wn. App. at 81.

A court is authorized to impose restitution in lieu of a fine where the defendant "caused a victim to lose money or property through the commission of a crime":

> 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 or when the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement, 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 a crime. Such amount may be used to provide restitution to the victim at the order of the court. It shall be the duty of the prosecuting attorney to investigate the alternative of restitution, and to recommend it to the court, when the prosecuting attorney believes that restitution is appropriate and feasible. If the court orders restitution, the court shall make a finding as to the amount of the defendant's gain or victim's loss from the crime, and if the record does not contain sufficient evidence to support such finding the court may conduct a hearing upon the issue. For purposes of this section, the terms "gain" or "loss" refer to the amount of money or the value of property or services gained or lost.

RCW 9A.20.030(1).

Harris first contends this statute does not support the order of restitution because the offense of driving with a suspended license is not an offense that involves loss of money or property. Under the plain language of the statute, that is not the issue. The issue is whether Harris "caused a victim to lose money or property through the commission of a crime." Harris also argues that Grayson was the victim, not her relatives. In view of the strong public policy favoring restitution, there is no reason to impose a narrowing definition of the term "victim." It was not an abuse of discretion for the court to construe "victim" as including the decedent's relatives who had to pay for her burial, a monetary loss.

Harris next contends the State did not prove that the burial expenses were causally connected to the crime of driving with a suspended license.

The State must establish by a preponderance of the evidence that the victim's loss would not have occurred "but for" the crime. Thomas, 138 Wn. App. at 82. To determine whether a causal connection exists, the reviewing court examines the underlying facts of the charged offense, not the name of the crime in question. State v. Griffith, 164 Wn.2d 960, 966, 195 P.3d 506 (2008). The loss need not be foreseeable. State v. Enstone, 137 Wn.2d 675, 682-83, 974 P.2d 828 (1999). Causation may be determined by employing a "but for" inquiry. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007).

Harris relies on a Florida case in which the defendant, while driving with a suspended license, was involved in an accident in which another person was injured. Schuette v. State, 822 So. 2d 1275 (Fla. 2002). The State asked the

court to order restitution to the injured person for medical bills and lost wages, arguing that the injuries would not have occurred "but for" the defendant's driving. Schuette, 822 So. 2d at 1283. The trial court denied restitution, and the Florida Supreme Court affirmed. "What is missing in this case is a causal relationship between the act of driving without a license and the accident that resulted in damages. The suspension of the license was an existing circumstance, rather than a cause of the accident." Schuette, 822 So. 2d at 1283.

Schuette is not persuasive authority because in Florida, the test for causation is two-pronged. The State must not only prove "but-for" causation but also must show that the loss bears "a significant relationship" to the offense of conviction. Schuette, 822 So. 2d at 1279. In this respect, Florida's test for causation resembles the test for proximate cause in a civil tort case. Schuette, 822 So. 2d at 1282. The same is true in Vermont. State v. LaFlam, 184 Vt. 629, 965 A.2d 519, 522 (2008) ("but-for causation" is an insufficient basis for restitution; some form of proximate causation is also required); see also People v. Taylor, 179 Cal. App. 3d Supp. 1, 5, 225 Cal. Rptr. 430 (1986) (a "but for" rule is not the test of the validity of a condition of restitution).

In LaFlam, the defendant drove through the front door of a store and caused $1,000 worth of damage. LaFlam, 965 A.2d at 520. The defendant was convicted only of driving with a suspended license. Citing Schuette, the court denied the State's request for restitution on the ground that causation in fact was not enough:

> Under the State's theory, the sole connection between defendant's conviction for driving with a suspended license and the damage to

> the building is that defendant's driving caused the damage to the building, and defendant was driving illegally at the time. We can reach this result only if we hold that causation in fact—"but for" causation—is the sole standard for causation for restitution in Vermont.

LaFlam, 965 A.2d at 521-22.

Here, the State offers the same theory of causation that was rejected by the courts in Florida and Vermont. The State's theory is that if Harris had not been driving, he would not have hit and killed Grayson. The State's theory is sound because in Washington, "but for" causation is sufficient to support an order of restitution.

Harris nevertheless contends the vacation of the order of restitution is compelled by Hartwell. In Hartwell, the defendant was convicted of hit-and-run and was ordered to pay restitution for the victims' injuries as part of his sentence for that conviction. We reversed, reasoning that leaving the scene of the accident was the precise event underlying the offense of hit-and-run. Because the victim's injuries were sustained before the defendant committed the offense, the offense did not cause them. We said, "Had Hartwell stayed at the scene, thereby not committing the offense, the injuries presumably would have been the same." Hartwell, 38 Wn. App. at 140. Harris argues that, given the absence of evidence that he was driving in an unsafe manner, Grayson presumably would have died even if he had been driving with a valid license and therefore under Hartwell there was no causation.

Whether or not Harris was driving carefully is immaterial to deciding whether or not his criminal conduct was a "but for" cause of the loss. Unlike in

Hartwell, the criminal act by Harris for which he was ordered to pay restitution was driving with a suspended license, not leaving the scene of the accident. It was his criminal act of driving when prohibited from doing so, not the status of having a suspended license, that caused the loss. On the night of the accident, Harris should not have been driving at all. It was his decision to drive illegally that placed him behind the wheel on East Marginal Way at the time and place Grayson was attempting to cross.

Harris argues that under the circumstances, Grayson might just as easily have been killed on that spot by a different driver. But the court was not obligated to speculate about what might have happened. The order of restitution was grounded on what did happen. But for Harris driving that night on East Marginal Way, Grayson's death would not have occurred as it did.

We conclude the State sufficiently proved that Harris, through his commission of the crime of driving with a suspended license, caused Grayson's relatives to incur burial expenses. The trial court did not abuse its discretion by ordering restitution.

Harris also contends that the court erred in denying his request for substitute counsel. On June 19, 2012, Harris told the court that he was unable to communicate with his public defender and asked that new counsel be appointed. The request was denied, and Harris did not renew it at any time during the five months that elapsed before the trial began on November 13, 2012.

In reviewing the denial of a motion to substitute new counsel, we consider (1) the extent of the conflict between the accused and his attorney, (2) the

adequacy of the trial court's inquiry into the conflict, and (3) the timeliness of the motion. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001). Harris is incorrect when he argues that he established a significant conflict merely by alleging that he was unable to communicate with defense counsel. In the three cases he cites, the colloquies were judged inadequate because at the time new counsel was requested, there was already significant evidence on the record of a breakdown in the attorney-client relationship. See Daniels v. Woodford, 428 F.3d 1181, 1199 (9th Cir. 2005), cert. denied, 550 U.S. 968 (2007); United States v. Nguyen, 262 F.3d 998, 1004-05 (9th Cir. 2001); United States v. Adelzo-Gonzalez, 268 F.3d 772, 778 (9th Cir. 2001). We conclude the trial court did not err in refusing to grant Harris' request for new counsel based on a single bare assertion of communication problems five months before trial.

In a statement of additional grounds for review filed as authorized by RAP 10.10, Harris contends that the trial court went into chambers with counsel and held a discussion about jury selection without him. The record does show that this occurred.[1] But the record also shows that after the discussion, the prosecutor advised the court that the in-chambers discussion was improper. "We've been advised by our appellate unit to not go in chambers, to just not do it, and that's why I expressed my concern."[2] The court decided to restart voir dire again from the beginning with the same pool of jurors.[3]

[1] Report of Proceedings (Nov. 14, 2012) at 154 (filed May 24, 2013).
[2] Report of Proceedings (Nov. 14, 2012) at 155 (filed May 24, 2013).
[3] Report of Proceedings (Nov. 14, 2012) at 157-59 (filed May 24, 2013).

The applicable case is State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011). In Irby, the trial court erred by making decisions regarding the fitness of jurors when the defendant was not present. Irby, 170 Wn.2d at 882. Here, no decisions were made during the brief chambers conference and voir dire began all over again once the problem was brought to the court's attention. We are satisfied that the court's handling of this situation avoided creating grounds under Irby for appellate review.

Affirmed.

Baker, J.

WE CONCUR:

Dwyer, J.

Cox, J.

APPENDIX B

Order Denying Motion for Reconsideration

July 24, 2014

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 ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, John Harris Jr., has filed a motion for reconsideration of the opinion filed June 23, 2014, and the court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DONE this 24th day of July, 2014.

FOR THE COURT:

Becker, J.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69729-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Andrea Vitalich, DPA
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 25, 2014