NO. 73542-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN VELEZMORO,

Appellant.

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

The Honorable John Chun, Judge

REPLY BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ISSUES IN REPLY

1. Under Washington law interpreting Washington statutes, must a criminal act be a "but for" cause of a victim's losses to warrant an award of restitution?

2. Does the Paroline case,[1] dealing only with a specific federal restitution statute, dictate the result as to Washington's general restitution statute?

B. ARGUMENT IN REPLY

1. UNDER OUR STATE'S RESTITUTION STATUTES, A CRIMINAL ACT MUST BE A "BUT FOR" CAUSE OF A VICTIM'S LOSSES TO WARRANT AN AWARD OF RESTITUTION.

A court may impose restitution only as authorized by statute. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). The State argues that "but for" causation, also known as cause-in-fact, is not required for a Washington court to order restitution under RCW 9.94A.753(3). Brief of Respondent (BOR) at 9. The State, however, points to no Washington case in which restitution was ordered absent "but for" causation.

Contrary to the State's assertions, moreover, this Court has explicitly stated that "but for" causation is required. "The State must establish by a preponderance of the evidence that the victim's loss would

[1] Paroline v. United States, ___ U.S. ___, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014).

not have occurred 'but for' the crime." State v. Harris, 181 Wn. App. 969, 974, 327 P.3d 1276 (2014) (quoting State v. Thomas, 138 Wn. App. 78, 82, 155 P.3d 998 (2007) (Division Two decision)), review denied, 181 Wn.2d 1031 (2015).[2] See also State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167(2007) (foreseeability is not required; rather, appropriate test for causation is "but for" analysis); State v. Kinneman, 155 Wn.2d 272, 287-88, 119 P.3d 350 (2005) (approving of "but for" analysis); State v. Hiett, 154 Wn.2d 560, 566, 115 P.3d 274 (2005) (employing "but for" analysis).

The State is correct that the Washington restitution statute should be interpreted broadly to carry out the purposes of the Sentencing Reform Act. State v. Fleming, 75 Wn. App. 270, 274, 877 P.2d 243, 245 (1994). But, consistent with this policy, this Court has permitted recovery where the crime is a cause-in-fact of a loss, correctly characterizing "but for" causation as a comparatively low threshold. See Harris, 181 Wn. App. at 974-76 (distinguishing Florida, Vermont, and California statutes where "but for" causation is deemed inadequate and a showing of tort law "proximate causation," i.e., legal causation, is also required).[3]

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[2] Harris dealt with restitution under RCW 9A.20.030 but cited to cases analyzing RCW 9.94A3.753 and thus appears to treat the causation analysis identically under each statute.

[3] Washington case law has recognized two elements constituting "proximate cause": Cause in fact and legal causation. Hartley v. State,

"But for" causation, a comparatively permissive criterion, is the standard employed by Washington courts. Washington courts retain the ultimate authority to interpret Washington statutes. Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994). The State has pointed to no case in which the prosecution was permitted to depart from this standard.

In summary, the State has not proven that Velezmoro's acts were a cause-in-fact of any injury or loss, a prerequisite to recovery under the general Washington restitution statute. The restitution order must be reversed. Harris, 181 Wn. App. at 974.

2. PAROLINE DEALS ONLY WITH A SPECIFIC FEDERAL RESTITUTION STATUTE AND DOES NOT GUIDE THE RESULT UNDER WASHINGTON LAW.

Contrary to the State's argument, the Paroline case, which analyzed only a specific federal restitution statute, and dealt only with a federal crime, does not control the result as Washington's general restitution statute.

Paroline interpreted 18 U.S.C. § 2259, the "Mandatory Restitution for Sex Crimes" section of the Violence Against Women Act of 1994.

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103 Wn.2d 768, 777, 698 P.2d 77 (1985). However, "proximate cause" is referred to in other contexts as "legal" cause, as distinct from cause-in-fact. Id. at 779-80.

That statute specifically provides for restitution to victims of sexual exploitation and abuse. Paroline v. United States, ___ U.S. ___, 134 S. Ct. 1710, 1716, 188 L. Ed. 2d 714 (2014).

In finding that *some* amount of restitution could be imposed,[4] the Paroline Court acknowledged it was departing from the "traditional way to prove that one event was a factual cause of another." Id. at 1722. The Court also explicitly limited its holding to the "special context" at issue in the case. Id. at 1727. Even federal cases have limited that case's alternative causation theory to its specific facts. E.g., United States v. Kolodesh, 787 F.3d 224, 242 (3d Cir.), cert. denied, 136 S. Ct. 281 (2015).

RCW 9.94A.753(3) is a general restitution statute covering felonies sentenced under the SRA, with an exception set forth in 9.94A.753(6). Indeed, that subsection is instructive, because it provides for restitution specific to a certain class of crimes, revealing that the Legislature is capable of making such distinctions when it wishes to do so.

To date, however, the Legislature has not seen fit to treat the appellant's crime differently from other crimes as far as restitution is

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[4] The Paroline Court explained the restitution amount should be neither "severe," given the limited causal role Paroline played in the victim's losses, nor should it be "token." Id. at 1727. The Court also set forth a nonexclusive list of factors to be carefully considered by the lower court in setting restitution in this context. Id. at 1728.

Although the State argues to the contrary, BOR at 18-19, no similar balancing of factors occurred in this case.

concerned. As a result, RCW 9.94A.753(3), as well as the cases analyzing that subsection and its precursors, control this Court's decision.

This Court should follow Washington law and reverse the restitution order.

C. CONCLUSION

For the reasons stated above and in Velezmoro's opening brief, this Court should reverse the restitution order.

DATED this 27TH day of May, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER WINKLER, WSBA No. 35220
Office ID. 91051

Attorneys for Appellant

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JOHN VELEZMORO,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, John Sloane, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF MAY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHN VELEZMORO
13137 129TH AVENUE
KIRKLAND, WA 98034

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MAY 2016.

X