FILED
Court of Appeals
Division I
State of Washington
12/7/2021 10:29 AM

FILED
SUPREME COURT
STATE OF WASHINGTON
12/7/2021
BY ERIN L. LENNON
CLERK

SUPREME COURT NO. 100445-1
NO. 81816-3-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

WILLIAM CARROLL, JR.,
Petitioner.

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

The Honorable Susan Amini, Judge

PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner William Carroll, Jr. seeks review of the Court of Appeals' decision in State v. Carroll, No. 81816-3-I (Op.), filed November 8, 2021, which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. When the Department of Labor and Industries' Crime Victims Compensation Program (CVCP) pays the victim of a crime for lost wages, does a mere receipt indicating the payment occurred, offered at the defendant's restitution hearing, constitute substantial credible evidence that the defendant's crime caused the victim to miss several months of work?

2. Did State v. Deskins, 180 Wn.2d 68, 322 P.3d 780 (2014) overrule *sub silentio* both State v. Kisor, 68 Wn. App. 610, 844 P.2d 1038 (1993), and State v. Pollard, 66 Wn. App. 779, 834 P.2d 51 (1992)?

3. If the State sets a restitution hearing in a criminal case, and asks the court to order the defendant to reimburse a CVCP award, may the defendant dispute the amount of the award at the restitution hearing or must he instead request a separate

hearing, pursuant to the crime victims' compensation act, chapter 7.68 RCW?

C. STATEMENT OF THE CASE

On January 6, 2020, William Carroll, Jr., pleaded guilty to one count of assault in the third degree, domestic violence, with sexual motivation, and one count of witness tampering, domestic violence. CP 17-63. The pleas arose from Mr. Carroll's encounter with his girlfriend on August 20, 2018, and from text messages he sent to her during the days following, asking her not to talk with the police. CP 31, 61.

The court imposed a total term of 19 months' confinement, waived discretionary legal financial obligations, and ordered Mr. Carroll to pay mandatory costs of $600, as well as restitution to be determined at a later date. CP 67-69.

On March 17, 2020, a representative from the King County Prosecutor's Victim Assessment Unit sent defense counsel a "Memorandum" asking him to sign an attached restitution order in the amount of $15,000, to be paid to the Crime Victims Compensation office in Olympia. CP 88. The memorandum advised defense counsel that if he did not sign the

attached order within three weeks, the Victim Assessment Unit would "automatically set a restitution hearing." CP 88. The memorandum did not cite any statute; nor did it discuss any means of challenging the $15,000 assessment, except impliedly by reference to the restitution hearing. CP 88.

The restitution hearing occurred telephonically, on June 24, 2020. RP 1-15. Mr. Carroll had waived his right to presence. RP 3; CP 67. In support of its request for $15,000, the State presented a "Cost Ledger" indicating that the CVCP[1] had paid that amount to Mr. Carroll's former girlfriend. RP 5-7; CP 90-91. A statement attached to the ledger indicated this was for lost wages from August 22, 2018, through January 22, 2020, based on a monthly compensation rate of $1,148.80. CP 91. Neither document contained any information explaining how the CVCP arrived at those amounts. CP 90-91.

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[1] The CVCP is administered by the Washington State Department of Labor and Industries. RCW 7.68.015. Some of the case law cited in this brief refers to the CVCP as "the Department." Mr. Carroll uses "CVCP" so as to be consistent with the State's briefing and Court of Appeals' decision in this case.

Defense counsel objected that the documents afforded no basis for determining the legitimacy of the State's claim. RP 5-6. He pointed out that they did not establish any causal connection between Mr. Carroll's offenses and the victim's inability to work. RP 5-6.

The State responded that it did not have to allege or establish any such causal connection. RP 6-8. It argued that, under RCW 9.94A.753(7), the CVCP can demand restitution for any amount it pays to a victim, without explaining how it calculated the amount or connected it to the defendant's crime. RP 6-8. The prosecutor told the court: "[T]he statutory authority doesn't really give the Court discretion in this case to deviate from what the [CVCP] has awarded to the victim for lost wages." RP 6-7.

Defense counsel disagreed. RP 8-9. He argued that RCW 9A.94A.753(7) required the court to order restitution "where the person is entitled to . . . benefits under the Crime Victims Compensation Act [chapter 7.68 RCW],"[2] but that the trial court

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[2] Under the crime victims' compensation act, a "victim" is one "who suffers bodily injury or death as a proximate result of a criminal act of another person." RCW 7.68.020(16). The CVCP

still had to make an independent determination of that entitlement. RP 8-9. Any other reading of the statute, he maintained, rendered the restitution hearing pointless. RP 9.

The court ordered both parties to brief the issue within one week. RP 11-13. The State's briefing cited State v. McCarthy, 178 Wn. App. 290, 313 P.3d 1247 (2013), a split decision from Division Two holding that the "direct causal relationship" standard normally applicable to a felony restitution order—which limits the award to damages directly caused by the defendant's crime—does not apply when the CVCP makes a restitution demand. CP 104-11.[3] The State argued that, under McCarthy, "[t]he court does not need to do its own evidentiary

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may award up to $15,000 to a victim for wage loss due to a "temporary total disability," but only where the victim-applicant's bodily injury results in an inability to work, and this inability results in actual monetary loss. RCW 7.68.020(15), .070(1)(a) & (2).

[3] See McCarthy, 178 Wn. App. at 294 ("The issue before us is whether a convicted defendant is obligated to pay restitution, regardless of whether the trial court finds a direct causal relationship between the costs and the defendant's convictions, when costs were paid by the Department of Labor and Industries . . . crime victim's compensation fund with the defendant's name as offender. We answer in the affirmative.").

hearing to find a causal connection because the CVCP has already done so." CP 106 (citing 178 Wn. App. at 300-01).

Defense counsel urged the court to follow McCarthy's dissent, according to which the trial court "must determine . . . whether the criminal acts the defendant was found to have committed proximately caused the victim's injuries." 178 Wn. App. at 305 (Johanson, A.C.J., dissenting). He argued this was consistent with the restitution statute's plain language and the trial court's duty of independent oversight. CP 84-85.

The trial court entered an order on August 4, 2020, imposing the full $15,000 in restitution. CP 86.

Mr. Carroll appealed, arguing that the trial court misconstrued the restitution statute, and violated due process protections, when it permitted the State to "prove" the amount of restitution owed with a conclusory, un-itemized "ledger" amounting to little more than a demand letter. Br. of App. at 5-16. Citing RCW 9.94A.753, chapter 7.68 RCW, State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005), Pollard, 66 Wn. App. at 783-85, State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984), and Kisor, 68 Wn. App. at 620, he argued

that the ledger provided neither a reasonable basis for estimating loss nor a sufficient basis for rebuttal, both of which are minimal due process requirements at a restitution hearing. Br. of App. at 12-13.

The State responded that it "did not have to provide *any* evidence of causation at the sentencing hearing because the [CVCP] was the real party in interest," but that "even if the sentencing court were required to find that Carroll's crime proximately caused [CVCP]'s losses," the ledger sufficed to prove that causal connection. Br. of Resp. at 10-13. The State explained that, because the CVCP "may only pay out losses proximately caused by the offender's crime," a demand letter from the CVCP necessarily proves that proximate cause. Br. of Resp. at 12-13.

In a deeply conflicted opinion, Division One adopted the latter theory. In direct contradiction to McCarthy, it held that the same "direct" or "proximate" cause standard applies to all restitution awards, including CVCP demands. Op. at 4. Yet it affirmed the restitution order in Mr. Carroll's case, reasoning (in a footnote):

> Whether a [trial] court independently concludes a beneficiary qualifies as a 'victim' . . . or accepts the CVCP's conclusion [to that effect] . . . the court concluded the offender's act proximately caused an injury to the beneficiary.

Op. at 4-5 n.8. Division One claimed, "this reasoning does not conflict with the holding in McCarthy." Id.

Division One also held that the CVCP's un-itemized "cost ledger" satisfied due process standards, under Deskins, 180 Wn.2d at 84, yet asserted (in a footnote) that it *would not reach* Mr. Carroll's procedural due process claim "because he fails to cite relevant authority to advance it." Op. at 3 n.2, 5-7. In this footnote, Division One made the surprising assertion—unconnected with any theory advanced by the State—that Mr. Carroll should have requested a separate hearing, pursuant to RCW 7.68.120(2)(a), if he wanted an accounting of the CVCP's $15,000 calculation. Op. at 3 n.2.

Finally, Division One acknowledged that the un-itemized ledger did not satisfy the due process standards articulated in Kisor, 68 Wn. App. 610, or Pollard, 66 Wn. App. 779. But it held (again, in a footnote) that these cases had been overruled *sub silentio*, by Deskins, 180 Wn.2d at 83. Op. at 6-7 n.21.

D. REASONS REVIEW SHOULD BE ACCEPTED

Division One's decision merits review under RAP 13.4(b)(2), (3), and (4).

Review is appropriate under RAP 13.4(b)(2) because Division One's decision conflicts with multiple published Court of Appeals decisions. Despite Division One's assertion to the contrary, its decision conflicts with McCarthy's statutory analysis. The decision also conflicts with Kisor, 68 Wn. App. 610, and Pollard, 66 Wn. App. 779, which hold that an un-itemized hearsay demand does not satisfy the minimal due process standards applicable in a restitution hearing.

Review is also appropriate under RAP 13.4(b)(3) because, by holding that defendants are no longer entitled to the minimum due process protections recognized in Kisor, 68 Wn. App. 610, and Pollard, 66 Wn. App. 779, Division One's decision raises a significant question of constitutional law.

Finally, review is appropriate under RAP 13.4(b)(4) because Division One's decision involves an issue of substantial public interest, which should be determined by this Court: May the CVCP always determine restitution awards in secret? And,

if not, may it do so unless the defendant requests a separate, collateral restitution hearing, under RCW 7.68.120(2)(a)?

1. Division One Reached McCarthy's Result while Rejecting McCarthy's Statutory Analysis: it Held the Mere Fact of a CVCP Award is Evidence the Defendant's Crime Caused Damages Equal to the Award.

A court's authority to impose restitution is purely statutory. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). In felony cases, this authority derives from RCW 9.94A.753.

RCW 9.94A.753 contains 10 subsections describing the trial court's power to determine, impose, and supervise the fulfillment of a convicted person's restitution obligations. Subsections (1) through (6) set various parameters on this authority, including time limits within which a restitution hearing must occur, factors the court must consider before imposing restitution, and the requirement that any restitution order be "based on easily ascertainable damages" for tangible losses resulting from the crime of conviction. See Kinneman, 155 Wn.2d at 285 (evidentiary hearing required, in event of dispute,

to determine that restitution imposed does not exceed losses incurred by victim and directly resulting from offense).

Of relevance here, subsection (7) provides:

> Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases *where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW*.

RCW 9.94A.753(7) (emphasis added).

In McCarthy, the majority acknowledged that RCW 9.94A.753(3)[4] and (5)[5] limit restitution to damages directly

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[4] This subsection provides:

> Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

[5] This subsection provides:

> Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section unless extraordinary

resulting from the defendant's crime. 178 Wn. App. at 295-98. But it held subsection (7) made this limit inapplicable to CVCP restitution:

> This section does not expressly identify what losses the court may impose on the accused, but the language urges that *any benefits paid by the compensation fund be imposed upon the defendant*. . . . The defendant's reimbursement of the [CVCP], under a loose rather than strict standard of causation, furthers the goal of the defendant facing the consequences of his conduct.

Id. at 301 (emphasis added). As a result, the McCarthy majority held that the defendant, who was convicted only of non-homicide offenses—robbery, residential burglary, and attempted extortion—was nevertheless liable for funeral and burial expenses the CVCP paid for victims shot by his accomplice. Id. at 292-93, 301.

> circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if 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.

Acting Chief Judge Johanson dissented, pointing out that a victim is "entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW," only to the extent "there was a causal relationship between [the defendant's] crime and the victim's damages." McCarthy, 178 Wn. App. at 308 (Johanson, A.C.J., dissenting). She noted that the trial court could not possibly have relied on the CVCP's proximate causation determination, since nothing in the record indicated the CVCP had ever made one. Id. at 306. Rather, the record indicated the CVCP had paid the funeral costs long before the defendant was convicted of any offense. Id. ("The only reasonable inference to be made . . . is that the [CVCP] paid benefits based on the Sate's initial charges.").

In this case, the State has consistently relied on McCarthy, both in the trial court and on appeal, to argue that causation is irrelevant at the restitution hearing because a trial court *cannot* question a CVCP restitution demand.[6] Division One rightly

[6] CP 106-07 (McCarthy concluded that . . . the trial court did not need to independently find a direct causal relationship between the conviction and the restitution ordered"); Br. of Resp. at 9 ("Because the CVCP has already established that the offender's crime proximately caused the victim's losses—or it would not

rejected this argument, holding instead that RCW 9.94A.753(7) requires the State to "demonstrate[] the requisite causal connection" between the defendant's crime and the victim's losses. Op. at 4. But it then concluded that the State proves this connection simply by showing that the CVCP paid money to a victim. Op. at 4-5 n.8.

This holding begs the obvious question: What if the CVCP pays out money to which a victim is not actually entitled under chapter 7.68 RCW—*i.e.*, money for damages not proximately caused by the defendant's crime? Division One's decision posits two answers to this question. The first violates due process protections and the second advances an unworkable interpretation of the crime victims' compensation statute.

2. Division One Erroneously Held that Criminal Defendants Are No Longer Entitled to the Minimal Due Process Protections Recognized in <u>Kisor</u> and <u>Pollard</u>.

"If the defendant disputes facts relevant to determining restitution sought, the State must prove the damages at an

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have paid out the money—the sentencing court does 'not need to independently find a direct causal relationship between the conviction and the restitution ordered.'") (Quoting <u>McCarthy</u>, 178 Wn. App. at 301).

evidentiary hearing by a preponderance of the evidence." Kinneman, 155 Wn.2d at 285. Although the rules of evidence do not apply at restitution hearings, due process protections do. Pollard, 66 Wn. App. at 783-85.

Consistent with those protections, the evidence supporting a restitution award must be reliable and provide "'a reasonable basis for estimating loss.'" Id. (quoting Mark, 36 Wn. App. 428). When the State presents hearsay evidence at a restitution hearing, due process requires "corroboration . . . by . . . proof which gives the defendant a sufficient basis for rebuttal." Kisor, 68 Wn. App. at 620, 844 P.2d 1038 (1993) (citing State v. S.S., 67 Wn. App. 800, 807-08, 840 P.2d 891 (1992)).

In Pollard, the defendant pleaded guilty to unlawfully issuing checks and agreed to pay restitution to four banks. 66 Wn. App. at 780-81. The State sought restitution equal to an amount the defendant had deposited into his own account, but the defendant contended this exceeded the banks' actual loss. Id. at 782. In support of its calculation, the State offered only an unsworn statement by a "victim's assistance unit representative" to the effect the amount deposited was equal to the amount the

banks lost. Id. A police report in the case file also referenced "what bank personnel . . . stated the banks had lost." Id. at 786.

As a matter of first impression, the Court of Appeals held that the rules of evidence do not apply at restitution hearings. Id. at 784-85. But it also held that the "double hearsay" offered by the State was insufficient to satisfy minimal due process standards. Id. at 784-86. The court explained that the evidence supporting a restitution award—whether hearsay or not—must be reliable and capable of rebuttal. Id. at 785-86. And it held the State's evidence failed by that standard, particularly where reliable evidence was readily available. Id. at 786 ("With relative ease the State could have produced bank records or personnel to precisely and conclusively establish the actual amounts lost.").

In Kisor, the defendant was convicted of "harming a police dog," after he shot and killed a dog pursuing him. 68 Wn. App. at 612-13. The State requested $17,380 in restitution. Id. at 613-14. At the restitution hearing, the State presented only an "affidavit" by the county's risk manager, stating:

> The cost of replacement of the police dog is as follows:

1. Replacement of animal 3,500

I checked with Tacoma Police Department and with Spokane Canine Training Units.

2. Room and Board 5,800
12 weeks motel @ $45/day 3,780
12 weeks meals @ $25/day 2,100
12 weeks training is normal

3. Deputy wages for 12 weeks 8,000

TOTAL $17,380

Id. at 613-14 & n.2. The trial court awarded restitution consistent with the affidavit. Id. at 614.

Citing Pollard, the Court of Appeals reversed. Kisor, 68 Wn. App. at 620. The court explained that due process required the State to provide at least some explanation of how the risk manager arrived at the figures in the affidavit. Id. The vague statement "that she 'checked' with" other entities did not suffice. Id.

In the Court of Appeals, Mr. Carroll argued the CVCP's cost ledger was far less detailed than the inadequate affidavit in Kisor, and thus insufficient to meet the due process standard applied in that case. Br. of App. at 17-18. Division One appears to have agreed with this assessment—it made no attempt to

reconcile its decision with Kisor. Instead, it held that both Kisor and Pollard were overruled *sub silentio* in Deskins, 180 Wn.2d at 83. Op. at 6-7 n.21. This is incorrect.

The defendant in Deskins was convicted of animal cruelty and confining animals in an unsafe manner. 180 Wn.2d at 74. While her case was pending, the State seized 37 dogs from her property. Id. It contracted with a local shelter to euthanize some of the animals and house others. Id. At the defendant's restitution hearing, the State presented bills detailing the amounts it had paid to the shelter. Id. at 74-75, 83. On appeal, the defendant argued these bills were insufficient under Kisor. Id. at 83.

The supreme court disagreed, holding, "This case is *distinguishable* from Kisor." Id. (emphasis added). It explained that, whereas in Kisor the State had offered "'nothing more than a rough estimate,' and gave 'no indication of where [the State] obtained the figures,' . . . [t]he statements and documents [offered at Deskins's hearing] where not speculation or conjecture but rather actual amounts billed to the sheriff's office by [the shelter]." Id.

Contrary to Division One's decision in this case, Deskins did not overrule Kisor or Pollard, it distinguished them. Op. at 6-7 n.21. The shelter bill in Deskins was a sum certain directly attributable to the defendant's crime of conviction. Deskins, 180 Wn.2d at 83-84. By contrast, both the hearsay affidavit in Kisor and the hearsay ledger in Mr. Carroll's case were merely assertions, by a government agent, that the defendant had caused thousands of dollars in losses. 68 Wn. App. at 620; CP 88. Such assertions are insufficient, particularly when proper evidence is readily attainable. Pollard, 66 Wn. App. at 786.[7]

These longstanding principles are firmly established in the case law on restitution. Nothing in Deskins unsettles them. See 180 Wn.2d at 82-83 ("Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or

[7] Such evidence should be readily attainable in any case involving a CVCP claim. Chapter 7.68 RCW requires the CVCP to award benefits according to numerous criteria, including the determination of a proximate causal relationship between the victim's injuries and lost wages. See RCW 7.68.020(15), (16), .070(1)(a). If the agency is complying with the statute, it presumably documents its eligibility determinations and should have no trouble attesting to them in court.

conjecture.") (Internal quotations omitted.) The supreme court does not overrule a case by expressly distinguishing it. Kettenhofen v. Globe Transfer & Storage Co., 70 Wash. 645, 649, 127 P. 295 (1912). Nevertheless, as Westlaw now confirms, both Kisor and Pollard are now "[c]alled into doubt by State v. Carroll."

3. Division One Held that a Defendant in a Criminal Case May not Dispute a CVCP Restitution Demand, Except Perhaps in a Collateral Civil Proceeding under a Different Cause Number.

In the Court of Appeals, Mr. Carroll argued that the trial court permitted the CVCP to determine both the fact and amount of the victim's wage loss in secret, shielded from judicial scrutiny. See Br. of App. at 12-16; Reply Br. at 2-3. The State agreed: it has consistently argued that the CVCP has no obligation to document its claims, which the sentencing court must simply accept at face value. RP 6-8; CP 106-07; Br. of Resp. at 9.

Division One embraced a different, completely un-briefed theory. See Op. at 3 n.3. According to this theory, when Mr. Carroll received the prosecutor's letter, telling him he could either agree to pay $15,000 or invoke his right to a restitution

hearing,[8] Mr. Carroll needed to request a second hearing under RCW 7.68.120(2)(a). See Op. at 3 n.3. At this second hearing, Mr. Carroll could seek an accounting of the CVCP demand. Id.

The statute invoked by Division One provides, in relevant part:

> Any person who has committed a criminal act which resulted in injury compensated under this chapter may be required to make reimbursement to the department as provided in this section.
>
> . . .
>
> The department may issue a notice of debt due and owing to the person found to have committed the criminal act . . . The department shall file the notice of debt due and owing along with proof of service with the superior court of the county where the criminal act took place. The person served with the notice shall have thirty days from the date of service to respond to the notice by requesting a hearing in superior court.

RCW 7.68.120, (2)(a). The statute goes on to say that the department may seek a default judgment in the event the person does not respond. RCW 7.68.120(2)(b).

Context and common sense dictate that RCW 7.68.120(2) does not apply where the superior court is already holding a

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[8] CP 88.

restitution hearing pursuant to a criminal case. The subsection immediately preceding RCW 7.68.120(2) provides:

> If, in a criminal proceeding, a person has been found to have committed the criminal act that results in the payment of benefits to a victim and the court in the criminal proceeding does not enter a restitution order, the department shall, within one year of imposition of the sentence, petition the court for entry of a restitution order.

RCW 7.68.120(1). This is exactly what the CVCP did in Mr. Carroll's case. See CP 88.

The CVCP presented Mr. Carroll with a "Memorandum" telling him he could either sign the restitution order or appear for the hearing. CP 88. The CVCP did not separately "issue a notice of debt due and owing," under RCW 7.68.120(2)(a), as this would have been redundant. Nevertheless, Division One held that Mr. Carroll should have requested a separate, collateral restitution hearing under that statute. Op. at 3 n.3.

Division One appears to have derived the collateral hearing theory from the following, in McCarthy:

> The dissent raises concern about a criminal defendant being ordered to pay restitution based upon a department finding without the defendant having an opportunity to challenge the Department's determination. Nevertheless, RCW 7.68.120(2) affords one charged with a crime an

> opportunity to object to a determination made by the crime victim's fund. In any case, McCarthy has not argued on appeal, or before the trial court, any injustice from or invalidity of the Department's determination against him. We do not address arguments not raised or briefed below.

178 Wn. App. at 302. Two things are alarming about this analysis.

First, the defendant in McCarthy argued he should not have to pay the victims' funeral and burial expenses, because he did not cause the victims' deaths. Id. at 293-94. To say that this defendant "has not argued . . . [the] invalidity of the Department's determination against him" defies basic precepts of logic and due process. Id. at 302.

Second, just as Division One did in Mr. Carroll's case, the McCarthy majority appears to have invoked the collateral hearing theory *sua sponte*—that theory appears nowhere in the State's briefing. Resp. Br., State v. McCarthy, No. 43308-7-II (filed Nov. 16, 2012). Given the serious policy questions implicated—including where the collateral restitution hearing is to take place, whether the resulting order will be binding on the sentencing court in the underlying criminal case, and whether the defendant has the right to counsel at the collateral hearing—it is

surprising the appellate court would reach this issue without any input from the parties. And it is particularly ironic that it did so, in both McCarthy and Mr. Carroll's case, while at the same time claiming it would not address unbriefed arguments. 178 Wn. App. at 302; see also Op. 3 n.3.

Related unpublished decisions from Division One contain similar contradictions and causes for concern. E.g., State v. Hernandez-Navarro, noted at 11 Wn. App. 2d 1068, 2020 WL 204022 (2020), at *2-*3 (first holding that RCW 9.94A.753(7) does not require the trial court to determine any "causal connection" between the defendant's crime and the CVCP award; later declining to reach that issue); State v. Ugalde, noted at 2 Wn. App. 2d 1001, 2018 WL 417968 (2018), at *1-*2 (denying defendant's CrR 7.8 motion to modify CVCP restitution award of $50,313.32, where later-obtained CVCP records showed victim's actual loss was only $10,338.34, because "RCW 9.94A.753(7) does not require a causal connection between the loss and the crime"). This Court should grant review and decide, once and for all, whether a defendant is

entitled to due process at a restitution hearing involving the CVCP.

E. CONCLUSION

Division One reached McCarthy's result while purporting to reject McCarthy's statutory interpretation. It also held three decades of restitution precedent had been overruled *sub silentio*, by a case that expressly distinguished that precedent. Finally, Division One held that a defendant in a criminal case may not dispute a CVCP restitution demand except by a collateral civil action under a different cause number.

This Court should accept review under RAP 13.4(b)(2), (3), and (4) and reverse the Court of Appeals' restitution award.

I certify that this document contains 4,795 words, excluding those portions exempt under RAP 18.17.

DATED this 7th day of December, 2021.

Respectfully submitted,
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FILED
11/8/2021
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. WILLIAM ROY CARROLL, JR., Appellant.	No. 81816-3-I UNPUBLISHED OPINION

VERELLEN, J. — Typically, a victim injured by a crime is entitled to restitution for their injuries. When a victim is compensated by the Crime Victims Compensation Program (CVCP), RCW 9.94A.753(7) lets the program petition the superior court for restitution for expenses incurred as a result of the crime. The court can rely on a broad range of evidence to determine the amount of restitution owed, so long as it does not rely on speculation or conjecture. Because the court here did not rely on speculation or conjecture to award a victim restitution for injuries caused by a criminal act, the court did not abuse its discretion.

Therefore, we affirm.

FACTS

Nearing midnight on August 20, 2018, William Carroll, Jr. and D.Q., a woman he was dating, were having sex. D.Q. told Carroll to stop. He refused. Carroll repeatedly punched D.Q.'s head and slammed it into the headboard of a bed. After Carroll stopped, sometime in the early hours of August 21, D.Q. ran away.

The next day, D.Q. went to the hospital because she had a migraine headache, felt fatigued, and was experiencing numbness, tingling and paralysis in her extremities. She was diagnosed with post-concussive syndrome.

In the following days, Carroll offered to pay D.Q. to keep her from speaking to the police. She refused, and he became paranoid that she had told the police about the attack. Carroll called D.Q. and threatened to kill her. She was afraid he would carry out his threat and reported both the threat and the attack to the police.

Carroll was charged with witness tampering, third degree assault with a sexual motivation, and second degree rape. Each charge carried a domestic violence enhancement. Carroll promised to plead guilty to the first two charges, and the State promised to dismiss the rape charge. Carroll entered guilty pleas on January 16, 2020. He stipulated to the facts in the certificate for determination of probable cause and in the prosecutor's summary.

On February 7, 2020, Carroll was sentenced to 19 months' incarceration, 36 months of community custody, $600 in legal financial obligations, and an amount of restitution to be determined later. He waived the right to appear at future restitution hearings.

D.Q. was unable to work from August 22, 2018 until January 22, 2020. She filed a claim with the CVCP. The CVCP determined she was entitled to $1,148.80 per month in lost wages and paid her a total of $15,000 as of February of 2020. On March 17, the King County Prosecuting Attorney's Victim Assistance Unit sent Carroll's defense counsel a letter requesting $15,000 in restitution for the CVCP as payment for D.Q.'s lost wages.

Carroll did not agree to the proposed amount of restitution, so the superior court held a restitution hearing. The court entered an order setting restitution at $15,000.

Carroll appeals.

ANALYSIS

We review an order setting restitution for abuse of discretion.[1] An abuse of discretion occurs when the sentencing court's decision is based on untenable grounds, when the court applies the wrong legal standard, or bases its ruling on an erroneous view of the law.[2]

Carroll argues the court abused its discretion because it entered the restitution order without requiring that the State provide evidence establishing a causal connection between Carroll's crimes and the $15,000 in restitution ordered pursuant to RCW 9.94A.753(7).[3]

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[1] State v. Cawyer, 182 Wn. App. 610, 616, 330 P.3d 219 (2014).

[2] Id. (quoting State v. Corona, 164 Wn. App. 76, 78, 261 P.3d 680 (2011)).

[3] Carroll also contends his procedural due process rights were harmed because he was unable to challenge the CVCP's restitution calculation. He asserts that the State's interpretation of RCW 9.9A.753(7) "empowers the CVCP—a government agency—to determine the amount of a restitution award in secret, completely shielded from judicial scrutiny." Reply Br. at 2. We decline to address this contention because he fails to cite relevant authority to advance it. Carroll does not acknowledge or discuss RCW 7.68.120, which sets notice and hearing procedures for the CVCP. RCW 7.68.120(2)(a) affords an offender notice of the amount of restitution calculated and an opportunity to request a hearing in superior court about the calculation. State v. McCarthy, 178 Wn. App. 290, 302, 313 P.3d 1247 (2013). Because Carroll provides no facts showing he was denied notice or the opportunity to be heard and makes only conclusory arguments about due process, we decline to consider the merits of his argument. RAP 10.3(a)(6); State v. Mason, 170 Wn. App. 375, 384, 285 P.3d 154 (2012) (quoting West v. Thurston County, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012)).

RCW 9.94A.753(7) mandates restitution for a "victim" who is entitled to benefits under chapter 7.68 RCW, the crime victim's compensation act. In relevant part, RCW 7.68.020(16) defines "victim" as "a person who suffers bodily injury or death as a proximate result of a criminal act of another person." A "criminal act" is "an act committed or attempted in this state which is . . . punishable as a felony or gross misdemeanor under the laws of this state."[4] Like the crime victims' compensation act, RCW 9.94A.030(54) defines "victim" with a proximate cause requirement: "'Victim' means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged."[5]

Under RCW 9.94A.753, "[r]estitution is allowed only for losses that are causally connected to a crime."[6] To determine whether a causal connection existed, "we look to the underlying facts of the charged offense, not the name of the crime to which the defendant entered a plea."[7] Thus, when the State provides evidence showing an offender committed a "criminal act" and the act caused injury to a "victim," the State has demonstrated the requisite causal connection.[8]

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[4] RCW 7.68.020(6)(a).

[5] (Emphasis added); see BLACK'S LAW DICTIONARY 274 (11th ed. 2019) (noting "direct cause" is synonymous with "proximate cause").

[6] State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d 350 (2005) (citing State v. Woods, 90 Wn. App. 904, 907-08, 953 P.2d 834 (1998)).

[7] State v. Griffith, 164 Wn.2d 960, 966, 195 P.3d 506 (2008) (quoting State v. Landrum, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992)).

[8] We note that this reasoning does not conflict with the holding in McCarthy, where the court concluded RCW 9.94A.357(7) does not require a trial court to "independently find a direct causal relationship between the conviction and the restitution ordered." 178 Wn. App. at 301. Whether a court independently concludes a beneficiary qualifies as a "victim" under RCW 9.94A.030(54) or accepts the CVCP's conclusion under RCW 7.68.020(16) that a beneficiary qualified as a "victim," its

Here, Carroll admitted he forcibly had sex with D.Q. and committed a felony by assaulting her, causing "bodily harm accompanied by substantial pain that extended for a period sufficient to cause considerable suffering."[9] Carroll's criminal act left D.Q. with bruises around her body, a concussion, and post-concussion syndrome. D.Q. qualified as a "victim" under RCW 7.68.020(16), so RCW 9.94A.753(7) applied and required ordering some amount of restitution.

"Once the fact of damage is established[,] the amount need not be shown with mathematical certainty."[10] "'Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.'"[11] A broad range of evidence is admissible because the rules of evidence do not apply to sentencing hearings.[12] The State has the burden of proving the amount of restitution by a preponderance of the evidence.[13]

In State v. Deskins, the court concluded the evidence of restitution supported the trial court's order.[14] After neighbors witnessed a woman dumping the body of a dog on

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conclusion that a beneficiary was a "victim" means the court concluded the offender's act proximately caused an injury to the beneficiary.

[9] Clerk's Papers at 61.

[10] State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984) (citing State v. Bush, 34 Wn. App. 121, 124, 659 P.2d 1127 (1983)).

[11] State v. Deskins, 180 Wn.2d 68, 82-83, 322 P.3d 780 (2014) (internal quotation marks omitted) (quoting State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005)).

[12] Id. at 83 (citing ER 1101(c)(3)).

[13] Id. at 82 (citing Kinneman, 155 Wn.2d at 285).

[14] 180 Wn.2d 68, 84, 322 P.3d 780 (2014).

the side of the road, the police searched her property and seized 37 live dogs.[15] Rather than care for the dogs itself, the sheriff's department sent them to an animal shelter for care.[16] The woman was later convicted of animal cruelty and, based upon bills from the shelter, ordered to pay $21,582.21 to the sheriff's department as restitution for paying the animal shelter.[17] The woman argued the State failed to prove the causal relationship between her crime and the restitution.[18] The court concluded the bills were sufficient proof because they "were not speculation or conjecture but rather actual amounts" billed by the shelter.[19] "The State did not need to provide any causal evidence except that it seized the animals in connection to an unlawful confinement of animals charge and that it incurred costs as a result."[20]

Here, the State submitted a cost ledger from the CVCP showing D.Q. received $15,000 as time loss compensation, calculated from August 22, 2018, when she was diagnosed with post-concussion syndrome caused by Carroll's assault, to February 8, 2020. The State also provided a letter from the CVCP to D.Q., explaining she was entitled to monthly compensation of $1,148.80 as "a wage loss payment."[21] To evaluate

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[15] Id. at 73.

[16] Id.

[17] Id. at 75-76.

[18] Id. at 83-84.

[19] Id. at 83.

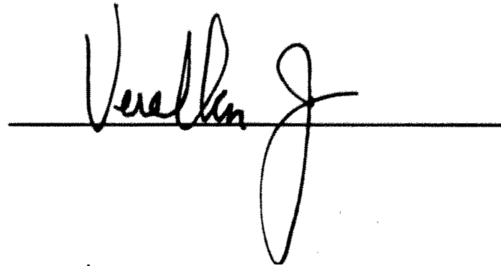
[20] Id. at 84.

[21] CP at 91. Carroll relies upon State v. Pollard, 66 Wn. App. 779, 834 P.2d 51 (1992), and State v. Kisor, 68 Wn. App. 610, 844 P.2d 1038 (1993), to argue the evidence here was insufficient because it did not provide "a sufficient basis for rebuttal." Appellant's Br. at 13; Reply Br. at 8. In Pollard, the court concluded that a report, which was "double hearsay, an insufficient basis upon which to base the sum of restitution ordered." 66 Wn. App. at 786. Citing Pollard, the Kisor court concluded evidence

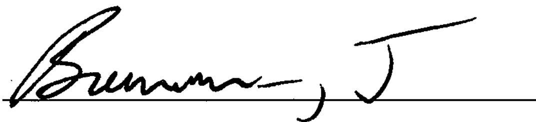
a lost wages claim, the CVCP requires "[d]ocumentation from a treating provider based on objective medical evidence stating the claimant is not able to work based on the effects of the crime injury."[22]

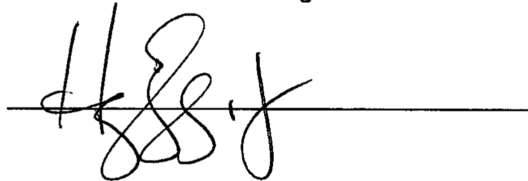
As in Deskins, the State proved Carroll committed a crime that caused injuries to a victim. It submitted documents showing the CVCP incurred $15,000 in damages as a result of the injuries Carroll inflicted on D.Q. Neither speculation nor conjecture were required to conclude the CVCP incurred damages as a result of Carroll's criminal act. Carroll may disagree with the amount of restitution requested, but, on this record, he fails to show the court abused its discretion by concluding he owed $15,000 in restitution to the CVCP.

Therefore, we affirm.



WE CONCUR:





provided to prove the amount of restitution was insufficient because it relied upon "hearsay declarations." 68 Wn. App. at 620. But Pollard and Kisor are called into serious doubt by Deskins, which distinguished Kisor and pointedly explained that the rules of evidence, including hearsay, do not apply to restitution hearings. 180 Wn.2d at 83 (citing ER 1101(c)(3)).

[22] WAC 296-30-010.

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December 07, 2021 - 10:29 AM

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