SUPREME COURT NO. 93882-2

NO. 73542-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN VELEZMORO,

Petitioner.

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

The Honorable John Chun, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner John Velezmoro asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' published decision in State v. John Velezmoro, filed October 31, 2016 ("Opinion"), attached as this petition's Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Under Washington law interpreting the state's own restitution statutes, an offender's crime of conviction must be a "but for" cause of losses in order to warrant a restitution award. Did the trial court err in awarding restitution absent such a showing?

2. Was the amount imposed by the trial court irretrievably speculative, reflecting an unauthorized $5,000 fine?

D. STATEMENT OF THE CASE

The State charged Velezmoro with first degree possession of depictions of minors engaged in sexually explicit conduct occurring between April 9 and May 21, 2013. CP 1-13. He later pleaded to the second degree of that offense after the State reduced the charge. CP 14-48, 404. The charge was reduced because Velezmoro was found to be

amenable to treatment for his illness. RP 2. The court sentenced him to three months of incarceration and ordered restitution in an amount "to be determined." CP 51.

Among the images found in Velezmoro's possession were seven images of a child victim known to the National Center for Missing and Exploited children as "Vicky." RP 3; CP 60 (State's restitution memorandum). Vicky, now in her 20s, acting through a Washington attorney, sought $5,000 in restitution from Velezmoro for losses, based simply on his possession of the images. CP 60-65 (State's restitution memorandum); CP 68-398 (documents considered for restitution hearing, submitted by Vicky's attorney Carol Hepburn).

There was indication that Vicky was aware of Velezmoro's possession of her image or that he interacted with the producer of the images. See CP 73, 79-80 (generic discussion, in Hepburn letter, of harms suffered by Vicky); RP 5 (Velezmoro's attorney's assertion, not contradicted by Hepburn, that Vicky was not specifically aware of Velezmoro's conduct). There was also no evidence that, had Vicky been aware of *Velezmoro's* possession of her image, she would have experienced the distress described in the materials.

In seeking restitution, however, Vicky's attorney relied on a relatively recent case from the United States Supreme Court, Paroline v.

United States, ___ U.S. ___, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014). The case involved similar facts[1] but dealt with a specific federal statute, 18 U.S.C. § 2259, requiring restitution in the context of offenses involving the sexual exploitation of children, including offenses related to child pornography. Vicky's attorney acknowledged that the general Washington restitution statute allows recovery for a narrower category of losses than does the federal statute, but she nonetheless argued the court should order restitution. CP 70.

The attorney initially requested $5,000 from Velezmoro in a February 24, 2015 letter to Velezmoro's attorney. CP 69. The letter explains the request as follows:

> Our request is for an apportioned amount of Vicky's documented economic losses, which are documented at $246,658.00. This is comprised of $113,600.00 in counseling expenses, $20,148.00 in educational and vocational counseling needs, and $112,910.00 in lost earnings. . . . We believe that Mr. Velezmoro should contribute $5,000.00 to the costs of her recovery.

CP 69. The larger amounts were based on the legal theory that, due to Vicky's emotional disturbance from the knowledge that her images continued to be circulated, she required ongoing mental health counseling.

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[1] Paroline pleaded guilty to possessing between 150 and 300 images of child pornography, which included two that depicted a single child, "Amy," who, as an adult, sought restitution from Paroline under the federal restitution statute specifically providing for restitution to victims of sexual exploitation and abuse. Paroline, 134 S. Ct. at 1716.

CP 72. These psychological effects had negatively affected her secondary and post-secondary education and delayed her entry into the work force. Moreover, she argued, the emotional disturbance could affect her future earning prospects.[2] CP 69-70, 73-79. The letter asserts Velezmoro is part of the "global market" for child pornography, CP 79, but does not claim the Vicky was specifically aware of the charges against Velezmoro. CP 73-77.

Vicky's attorney also submitted a letter to the court on April 29, 2015. CP 83. The letter acknowledges that Velezmoro had argued that only post-offense losses should be considered, that is, losses incurred after April of 2013. The attorney calculates a total of $183,819.00 for counseling costs and lost wages. CP 83-84. The letter then offers the following calculation to justify a continued request for $5,000.00, the same amount requested in the initial letter:

> If we compare the lesser [post-April 2013] figure of post offense counseling costs and post offense past lost wages allowable in Washington ($183,819.00) to the larger figure

[2] Attached to the attorney's letters were victim impact statements submitted by Vicky and her family in previous, unrelated, cases (CP 130-45); a series of psychological evaluations assessing the impact of Vicky's psychological disturbances on her ability to function in school and in the workplace, including the most recent April 2014 evaluation (CP 147-228); a "vocational assessment" relying on the psychological evaluations (CP 245-58); an economist's estimate of Vicky's past and future lost wages through retirement assuming she continued on her chosen career path (CP 265-308); examples from online fora indicating the "Vicky" series of images continued to be a topic of prurient interest online (CP 321-74); and finally, two copies of the Paroline case (CP 91-128, 376-98).

> allowable under [18 U.S.C. § 2259] ($1,084,053.29) the pro rata amount is 17%. Applying this to [the amount of restitution Vicky had received to date, or $692,548.94] yields an amount of $117,733.32 having been received against the Washington restitution amount and net losses of $66,085.68 remaining to be compensated.

CP 84.

The trial court conducted a hearing on restitution on May 1, 2015. At the hearing, the State argued $5,000 in restitution should be imposed but largely deferred to Vicky's attorney, Hepburn. RP 3. Hepburn argued that the court should follow the causation rationale espoused in the Paroline case, RP 10, and that $5,000 was a "reasonable" figure, reiterating calculations set forth in the letters. RP 3-5, 12.

In contrast, Velezmoro's attorney argued in part that "the State had failed to show a "but for" causal connection, required by Washington law, between Velezmoro's crime and any losses. RP 5-7, 9.

The court ordered the amount of restitution requested by Vicky's attorney. RP 13-14. Velezmoro's attorney questioned the court regarding how it had arrived at the $5,000 figure. RP 13. The court responded that Vicky still had uncompensated costs but acknowledged "[m]athematically precise, it's not." RP 14.

Velezmoro appealed, raising, primarily, the issues identified above. CP 399-403. On October 31, 2016, the Court of Appeals issued a

published opinion affirming the restitution award. The opinion holds, for the first time, that "but for" causation is unnecessary to impose restitution under RCW 9.94A.753 and similar Washington statutes. Opinion at 5-9.

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE CASE PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST AND THE OPINION CONFLICTS WITH AUTHORITY FROM THIS COURT AND THE COURT OF APPEALS.

Rejecting the general rule that the crime of conviction be a but-for cause of a claimed loss, the Court of Appeals employed a rationale that is novel in Washington restitution cases and conflicts with other opinions of the Court of Appeals and of this Court. RAP 13.4(b)(1), (2).

The published opinion expands liability for restitution under the Sentencing Reform Act (and potentially other statutory provisions) and will likely have far-reaching effects. Thus, the case involves a matter of substantial public interest. RAP 13.4(b)(4)

This Court should grant review and reverse the Court of Appeals.

1. Under Washington law, the crime of conviction must be a "but for" cause of losses in order to warrant restitution. This is a relatively permissive standard, which Washington courts have determined strikes an appropriate balance.

In this state, the crime of conviction must be a "but for" cause of a claimant's losses for restitution to be warranted. This standard reflects is

comparatively permissive standard and is consistent with the requirement that the restitution statutes be broadly interpreted.

A court may impose restitution only as authorized by statute. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). The amount of restitution must be based "on easily ascertainable damages." State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (citing RCW 9.94A.753(3)). Before this published opinion, appellate courts in this state uniformly required a "but for" causal relationship between the crime of conviction and the losses claimed. "The State must establish by a preponderance of the evidence that the victim's loss would 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)), review denied, 181 Wn.2d 1031 (2015).[3] 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).

[3] Harris dealt with restitution under RCW 9A.20.030 but cited to cases analyzing RCW 9.94A.753.

As stated above, there was no evidence before the court that "Vicky" was aware of Velezmoro's possession of her image or that he interacted with the producer of the images. See CP 73, 79-80 (attorney's generic discussion of harms suffered by Vicky); RP 5 (Velezmoro's attorney's assertion, not contradicted by Vicky's attorney, that Vicky was not specifically aware of Velezmoro's conduct). There was no evidence that, had Vicky been aware of *Velezmoro's* possession of her image, she would have experienced the distress described in the materials submitted by her attorney.

As a result, the State failed to demonstrate that Velezmoro's specific crime of possessing the images in April and May of 2013 was a cause in fact of Vicky's distress, or of any resulting economic losses.

Velezmoro acknowledges that Washington courts have stated that our state's restitution statute should be interpreted broadly, consistent with the purposes of the Sentencing Reform act. State v. Fleming, 75 Wn. App. 270, 274, 877 P.2d 243, 245 (1994). However, "but for" causation already takes this principle into account. The Court of Appeals has correctly characterized "but for" causation as a comparatively low burden. 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).[4]

"But for" causation, a comparatively permissive criterion, is the standard employed by Washington courts. Even in light of the United State Supreme Court's Paroline decision, which interpreted a federal statute of limited application,[5] 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). Until this case, the State had not been permitted to depart from this standard. For this reason, this Court should grant review and reverse the restitution order.

2. The amount imposed by the trial court reflects the result of speculation and conjecture and is, essentially, an impermissible, statutorily-unauthorized fine.

Although an award of restitution need not exactly reflect a victim's losses, the amount imposed by the trial court in this case was insufficiently related to any showing of loss. It is akin to a predetermined $5,000 fine, which our Legislature has not authorized.

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[4] Washington has recognized two elements constituting "proximate cause," cause-in-fact and legal causation. Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). But "proximate cause" is referred to in other contexts as "legal" cause, as distinct from cause-in-fact. Id. at 779-80.

[5] Paroline interpreted 18 U.S.C. § 2259, the "Mandatory Restitution for Sex Crimes" section of the Violence Against Women Act of 1994. That statute specifically provides for restitution to victims of sexual exploitation and abuse.

Evidence supporting restitution is sufficient only if it provides a reasonable basis for estimating loss and does not require the court to base its award on speculation or conjecture. Griffith, 164 Wn.2d at 965.

Vicky's attorney identified a total amount purporting to represent Vicky's uncompensated losses in Washington, or $66,085.68, and asserted $5,000 is a reasonable share of this uncompensated amount. This "calculation" does not withstand scrutiny.

Vicky's attorney represented that $66,085.68 was derived from the total allowable restitution in Washington, or $183,819.00. But nothing in the letter explained how this larger figure related to the actual economic harm Vicky suffered. Clearly, not all internet consumers of such images are from Washington.[6] It is equally clear that no single possessor of the images, Washingtonian or otherwise, caused Vicky's emotional distress. Thus, it is unclear why only Washingtonians would be responsible for this entire amount. Residents of other states presumably use, and misuse, the Internet.

The random and speculative nature of the attorney's request is made even more transparent by the fact that the figure remained exactly the same in the February and April letters, despite the attorney's apparent

[6] As Vicky's attorney explained, Vicky has received $692,548.94 in restitution from other jurisdictions but has sought restitution in only one other Washington proceeding. RP 13. The details of that case are not apparent from the record.

acknowledgment that the overall claim should be reduced based on the restitution framework in Washington.

Although no Washington case presents identical facts, case law from this Court interpreting our state's restitution statute does not allow for such a speculative award. For example, in Griffith, burglars broke into Robert and Elaine Linscott's home and stole jewelry and other items. The Linscotts provided police a list of the stolen items and their estimated values, which totaled $44,000. 164 Wn.2d at 963.

The next day, Griffith entered a local coin dealer with bags containing jewelry, including a string of pearls and what appeared to be a large diamond ring. Griffith sold the dealer miscellaneous gold jewelry for $96. Griffith also asked the dealer to appraise the diamond ring. One of the two owners offered her between $480 and $500, but she declined. Griffith sold the dealer the pearl necklace. Id

Shortly after the burglary, Elaine searched local pawnshops and resale stores for her belongings. She found several items, including her pearl necklace, at the coin dealer. One of the business owners identified Griffith as the person who sold the stolen jewelry. Id.

The State charged Griffith with second degree trafficking in stolen property. She pleaded guilty and indicated she understood she would be ordered to pay restitution. Id. at 963-64.

The court held a restitution hearing. Elaine testified that approximately $11,000 worth of her jewelry was still missing, including a two-and-a-half carat diamond ring and various gemstone rings. She said she understood Griffith had been seen "carrying" these gems. Id. at 964.

One of the business owners testified Griffith came in with a "bag of stuff" and sold him scrap gold for $96. Id. When asked if he recalled seeing Elaine's "two and a half carat diamond ring," he said he saw a ring with a large, diamond-like stone. Id. He remembered the pearl necklace, but could not identify the other items listed in the police report as being in Griffith's possession. Id.

At the close of the hearing, the trial court ordered Griffith to pay $11,500, more than the full value of all the missing jewelry. Griffith appealed. Id.

This Court ordered reversal of the restitution award because the evidence did not support an award in that amount. Elaine's testimony that Griffith had $11,000 worth of her jewelry was based on a misunderstanding of what the coin dealer had observed. Id. at 966-67. Moreover, Griffith pleaded guilty, not to the burglary itself, but rather to possessing between $250 and $1,500 in stolen property. Griffith was responsible only for the value of the unrecovered property proven to be causally related to her crime. Id. at 967.

The Court of Appeals opinion in State v. Dedonado is also instructive. 99 Wn. App. 251, 991 P.2d 1216 (2000). There, Dedonado damaged a van's ignition switch while stealing the van. Id. at 253. At the restitution hearing, the State submitted a mechanic's preliminary estimate for damage to the van that included not only the damaged ignition switch, but also items such as "fill all fluids" and "align front suspension." Id. at 255. The Court of Appeals held that the State failed to meet its burden of proving restitution amounts because it was impossible to determine from the State's documentation whether the repairs were related to the theft. Id. at 257. Thus, the documentation "did not establish a causal connection between Dedonado's actions and the damages" claimed. Id.

As Griffith and Dedonado demonstrate, the fact that the State can produce a figure associated with a victim's losses does not mean it is an appropriate award under the restitution statute.

Perhaps most significantly, however, the fact that Vicky requested the same amount after appearing to acknowledge that certain losses were not permitted firmly establishes the arbitrariness of the request, as well as the arbitrary nature of the court's award. The amount imposed by the court (based on Vicky's apparently immutable request) reflects a $5,000 fine, which was not authorized by the legislature. See State v. Jackson, 65 Wn. App. 856, 860, 829 P.2d 1136 (1992), opinion corrected (Aug. 3,

1992) ("'[f]ine' is commonly understood to mean '[a] sum required to be paid as punishment or penalty for an offense.'"). To date, the Legislature has not seen fit to treat the petitioner's crime differently from other crimes for purposes of restitution.[7]

F. CONCLUSION

The Court of Appeals' opinion conflicts with opinions from this Court as well as the Court of Appeals. This case also involves interpretation of our state's restitution statute, with potentially far-reaching implications. Thus, the case involves an issue of substantial public interest appropriate for review by this Court. This Court should accept review under RAP 13.4(b)(1), (2) and (4) and reverse the Court of Appeals.

DATED this 22nd day of November, 2016.

Respectfully submitted,

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JENNIFER WINKLER, WSBA No. 35220
Office ID No. 91051

Attorney for Petitioner

[7] Cf. RCW 9.94A.753(6) (providing for restitution specific to a certain class of crimes, revealing the Legislature is capable of making such distinctions when it wishes to do so).

APPENDIX

RICHARD D. JOHNSON,
Court Administrator/Clerk

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of the
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October 31, 2016

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CASE #: 73542-0-I
State of Washington, Respondent v. John B. Velezmoro, Appellant

King County, Cause No. 13-1-15323-4.KNT

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh
Enclosure

c: The Honorable John Chun
John B. Velezmoro

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 73542-0-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
JOHN B. VELEZMORO,	)	PUBLISHED OPINION
	)	
Appellant.	)	FILED: October 31, 2016

SPEARMAN, J. — Restitution is mandatory "whenever the offender is convicted of an offense which results in injury to any person. . . ." RCW 9.94A.753(5). John B. Velezmoro was one of an unknown number of people who possessed pornographic images of "Vicky,"[1] a victim of child sexual abuse. Velezmoro pleaded guilty to possession of child pornography. At a restitution hearing, the trial court determined that Velezmoro's offense was a cause of the injury Vicky suffered from the ongoing distribution of images of her abuse. The court ordered Velezmoro to pay restitution toward Vicky's actual losses. Velezmoro challenges the order, arguing that restitution may only be ordered when the State establishes that but for the defendant's conduct, the victim's losses would not have occurred.

Generally, the but-for test is the way to prove that one event was the factual cause of another. But where the application of that test leads to anomalous results, alternative ways of proving causation may apply. In the

[1] Vicky is a pseudonym.

circumstances here, where an unknown number of people possessed pornographic images of Vicky's abuse, each possessor had a share in causing her harm. The trial court did not err in determining that Velezmoro's offense was a cause of Vicky's loss. We affirm.

FACTS

Velezmoro pleaded guilty to possession of child pornography in the second degree after police discovered a large cache of child pornography on his computer. Many of the files in Velezmoro's possession featured child victims whose identity had been established by law enforcement. Seven of the files were part of a series of pornographic videos involving Vicky.

A relative began sexually abusing Vicky when she was five years old. The relative made and distributed videos of Vicky's abuse in response to requests from consumers of child pornography. Vicky's abuse stopped when she was thirteen years old and she began to recover from the trauma of her experience. But when Vicky was seventeen, she learned that images of her abuse had been widely disseminated via internet.[2] Knowledge that images of her abuse are in circulation caused renewed trauma, from which Vicky continues to suffer.

Vicky sought restitution from Velezmoro. Vicky did not allege that she was specifically aware that Velezmoro possessed her images, but argued that he was part of the market for child pornography and shared in causing the damages she suffered from the continued distribution of her images. Vicky submitted

[2] The pornographic images, obscene commentary on the images, and speculation about Vicky's current life remain widespread on the internet.

documentation of her ongoing trauma and the actual economic losses incurred. At the hearing, Velezmoro argued that Vicky could not show causation and that she had already recovered her actual economic losses through restitution from other criminal defendants.

The trial court found that Vicky had actual unrecovered losses and ordered Velezmoro to pay $5000 in restitution. The court acknowledged that it was impossible to determine Velezmoro's share of Vicky's losses with "mathematical precision," but held that $5000 was a reasonable apportionment. Verbatim Report of Proceedings (VRP) at 14. Velezmoro appeals.

DISCUSSION

Velezmoro asserts that the trial court erred in ordering restitution by using an improper legal analysis. He contends that a trial court may only order restitution when it determines that but for the defendant's offense the victim's loss would not have occurred. We review a trial court's order of restitution for abuse of discretion. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007) (citing State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999)). A trial court abuses its discretion if its order rests on an incorrect legal analysis. Id.

The authority to order restitution is based on statute. Id. (citing State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992)). Under the Washington restitution statute, a court shall order restitution "whenever the offender is convicted of an offense which results in injury to any person." RCW 9.94A.753(5). Restitution is mandatory "unless extraordinary circumstances exist which make restitution inappropriate. . . ." RCW 9.94A.753(5).

Restitution serves "both punitive and compensatory" purposes. State v. Kinneman, 155 Wn.2d 272, 279–80, 119 P.3d 350 (2005) (citing State v. Moen, 129 Wn.2d 535, 539 n. 1, 919 P.2d 69 (1996)). One aim of restitution is "to require the defendant to face the consequences of his or her criminal conduct." Tobin, 161 Wn.2d at 524 (quoting State v. Davison, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991)). Accordingly, restitution is only allowed for losses that are causally connected to the crime charged. Id. (citing Kinneman, 155 Wn.2d at 286).

The statute expresses this causal connection by requiring restitution when a criminal offense "results in injury to any person." RCW 9.94A.753(5). In evaluating whether an injury is the result of an offender's crime, Washington courts have applied a but-for analysis. See, e.g., State v. Hiett, 154 Wn.2d 560, 566, 115 P.3d 274 (2005) (affirming restitution for lost property when, "[b]ut for the taking of the vehicle, the personal property would not have gone missing"); State v. Harris, 181 Wn. App. 969, 976, 327 P.3d 1276 (2014) review denied, 181 Wn.2d 1031, 340 P.3d 229 (2015)) (affirming restitution where but for the defendant's conduct in driving, the victim would not have been struck and killed); State v. Wilson, 100 Wn. App. 44, 50, 995 P.2d 1260 (2000) (affirming restitution for investigative costs where "but for the embezzlement, the victim would not have incurred" the costs).

Velezmoro argues that the trial court erred in awarding restitution because Vicky did not establish that his conduct was a but-for cause of her damages. App. Br. at 7-9. The State agrees that restitution may only be awarded for losses

that are causally connected to the crime, but argues that the but-for test is not the proper measure of actual causation in all circumstances. The State argues that the trial court properly followed Paroline v. United States, __ U.S. __, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014), in using an alternative causation analysis.

In Paroline, the defendant pleaded guilty to possessing child pornography, including two images of a child victim identified as "'Amy.'" Id. at 1716. Amy had been sexually abused by her uncle in order to produce child pornography. Id. at 1717. After Amy's uncle was prosecuted and sentenced to prison, Amy began to recover. Id. But as a teenager, Amy learned that images of her abuse were being trafficked on the internet. Id. Knowledge that these images were being distributed produced renewed trauma, and "meant the wrongs inflicted upon her were in effect repeated . . . ." Id.

Amy sought restitution from Paroline for the total amount of damages she suffered as a result of the distribution of her images, about $3 million in lost income and $500,000 in future counseling and treatment costs. Id. at 1718. She stipulated that she did not know who Paroline was and that her losses did not stem from specific knowledge that he possessed her images. Id. But she argued that all possessors of her images were jointly and severally liable for her damages. Id. The district court declined to order restitution because Amy could not prove but-for causation. Id. The Court of Appeals reversed and ordered Paroline to pay restitution in the full amount of Amy's damages. Id.

The Supreme Court accepted review to determine the proper causation analysis and amount of restitution. Id. The Paroline Court noted that the

restitution statute at issue requires a showing of both actual and legal causation. Id. at 1722. Actual causation, or causation in fact, is traditionally proven by showing that but for the defendant's criminal act the victim's injury would not have occurred. Id. The Court recognized that in this case, where Paroline was only one of thousands of anonymous possessors, Amy could not establish but-for causation. Id. at 1723. But the Court noted that "courts have departed from the but-for standard where circumstances warrant, especially where the combined conduct of multiple wrongdoers produces a bad outcome." Id. at 1723 (quoting Burrage v. U.S., __ U.S. __, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014).

In the circumstances of Paroline, the Court reasoned that but-for causation would be contrary to both the punitive and the compensatory purposes of restitution. 134 S. Ct. at 1726-27. Such a standard would fail to recompense the victims that child pornography statutes are enacted to protect. Id. at 1726. And it would also "leave offenders with the mistaken impression that child-pornography possession (at least where the images are in wide circulation) is a victimless crime." Id. at 1727. The Paroline Court accordingly applied a form of aggregate causation and held that, where a child victim suffers from the ongoing trade in her images, each possessor of those images shares in causing the harm. Id. at 1726. The Court rejected joint and several liability but held that restitution should be based on "the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses." Id. at 1728.

Paroline is strikingly similar to this case. In both cases, the defendant pleaded guilty to possession of child pornography, including images of an identified child victim. The child victim in each case suffers on-going injury and economic loss from the continued distribution of her images. In both cases, the defendant is only one of an unknown number of persons who have obtained pornographic images of the victim's sexual abuse. As in Paroline, applying but-for causation in the present case would preclude restitution, contrary to both the compensatory and punitive aims of the statute.

However, Velezmoro contends that this court has explicitly required but-for causation. This court has stated that causation is shown by establishing that but for the defendant's conduct the victim's loss would not have occurred. See, e.g., Harris, 181 Wn. App. at 974 ("The State must establish by a preponderance of the evidence that the victim's loss would not have occurred 'but for' the crime."); State v. Thomas, 138 Wn. App. 78, 82, 155 P.3d 998 (2007) ("To prove a defendant's crime caused the victim's loss, the State must establish the loss would not have occurred but for the crime.") (citing State v. Hahn, 100 Wn. App. 391, 399, 996 P.2d 1125 (2000)). But the essential requirement is a causal connection between the crime and the victim's loss. RCW 9.94A.753(5) (restitution is mandatory for all offenses that "result[] in injury"). See also Kinneman, 155 Wn. 2d at 286 ("Restitution is allowed only for losses that are causally connected to a crime...").

Like Washington courts, federal courts traditionally apply a but-for analysis to determine actual causation. See Paroline, 134 S. Ct. at 1722. But in Paroline,

the Supreme Court drew on alternatives to but-for causation recognized in tort law. Id. at 1723. For example, one torts treatise explains that "'when the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.'" Id. (quoting W. Keeton Dobbs, R. Keeton, D. Owens. Prosser and Keeton on Law of Torts, § 41, at 268 (5th ed. 1984)). The Paroline Court concluded that the principles underlying such alternative measures of causation applied in the circumstances of that case. Id. at 1726.

Washington courts have also recognized alternatives to but-for causation in tort law. In a case involving pesticides sprayed by crop-dusting airplanes, the Supreme Court upheld a jury instruction reflecting aggregate causation. Hue v. Farmboy Spray Co. Inc., 127 Wn.2d 67, 90-93, 896 P.2d 682 (1995). The Hue court held that the plaintiffs properly argued that the defendant's pesticide was "'part of a cloud that then was the proximate cause of damage.'" Id. at 91 (quoting Supplemental Report of Proceedings at 336-37). The Hue court rejected the argument that the plaintiffs were required to show that an individual defendant's product was a but-for cause of injury. Id. Similarly, in Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 28-33, 935 P.2d 684 (1997), this court rejected the argument that the plaintiff in an asbestos case was required to prove that but for exposure to the defendant's specific product, his injury would not have occurred. See also Cox v. Spangler, 141 Wn.2d 431, 443-44, 5 P.3d 1265 (2000) (approving a burden-shifting analysis in apportioning fault "[w]here the

tortious conduct of two or more actors has combined to bring about harm to the plaintiff . . . .") (quoting RESTATEMENT (SECOND) OF TORTS §433B (1965)).

In the circumstances of this case, a but-for analysis produces results inconsistent with the purposes of the restitution statute. Like the Paroline Court, we conclude that principles of alternative causation applicable in tort law are relevant in such circumstances. While the but-for analysis is the general test for actual causation, in the circumstances here, the trial court did not abuse its discretion in following the Paroline approach.

Velezmoro next argues that Paroline is inapposite because it interprets the federal restitution statute, not the Washington statute. He asserts that the statute at issue in Paroline, 18 U.S.C. §2259, is "a specialized federal statute with an alternative concept of causation." App. Br. at 11.

The statute at issue in Paroline makes restitution mandatory for the full amount of losses "suffered by the victim as a proximate result of the offense." 18 U.S.C. §2259(b)(3)(F). The term "victim" refers to "the individual harmed as a result of a commission of a crime under this chapter. . . ." 18 U.S.C. §2259(c). The Washington restitution statute, RCW 9.94A.753, applies "whenever the offender is convicted of an offense which results in injury to any person. . . ." RCW 9.94A.753(5). Restitution is mandatory "unless extraordinary circumstances exist which make restitution inappropriate. . . ." RCW 9.94A.753(5).

Both the federal and the Washington statute require a causal connection between the victim's injury and the offender's crime by using the word "result."

See Burrage v. United States, 134 S. Ct. at 888 (stating that the phrase "results from" imposes a requirement of actual causation). The federal statute requires restitution when a person is "harmed as a result of a commission of a crime. . . ." 18 U.S.C. §2259(c). The Washington causation provision similarly requires restitution when a criminal offense "results in injury to any person." RCW 9.94A.753(5). The cause in fact provisions of the two statutes are essentially the same. We reject Velezmoro's assertion that the federal statute expresses an alternative concept of causation.

Next, Velezmoro appears to argue that the Washington restitution statute does not apply to the offense of possession of child pornography. He contrasts the location of the federal statute with that of the Washington statute. The federal statute is located within a chapter addressing sexual exploitation of children and specifically applies to offenses under that chapter, including possession of child pornography. The Washington statute, on the other hand, is located within the general Sentencing Reform Act.

The Washington restitution statute is not limited to specific crimes but applies "whenever the offender is convicted of an offense which results in injury to any person. . . ." RCW 9.94A.753(5). To accept Velezmoro's assertion that the restitution statute does not apply to possession of child pornography, we would have to conclude that that offense does not result in injury to the child victim. This is contrary to the intent of chapter 9.68A RCW, the chapter criminalizing sexual exploitation of children.

In a statement of findings and intent, the legislature stated its purpose to protect children from the harms of sexual exploitation and abuse. RCW 9.68A.001. Every instance of viewing child pornography is "a renewed violation" and "a repetition of their abuse." RCW 9.68A.001(3). Protecting children from these harms is of such importance that the legislature amended the chapter to specify that the unit of prosecution for possession of child pornography is per incident. RCW 9.68A.001. Given these legislative findings, it is not reasonable to conclude that possession of child pornography is a victimless crime to which the restitution statute does not apply. We reject Velezmoro's argument.[3]

We conclude that the trial court did not err in ordering restitution. The restitution statute requires a causal connection between the crime and the injury. While the but-for test is the general test for actual causation, the trial court did not err in applying an alternative causation analysis in the circumstances here.

Velezmoro next argues that the trial court erred in setting the amount of restitution. The Washington restitution statute provides for an amount of restitution based on "easily ascertainable damages." RCW 9.94A.753(3). Easily ascertainable damages include "actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.753(3).

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[3] Velezmoro also argues that the restitution statute specifically addresses the crime of rape of a child. He asserts that, if the legislature intended the statute to apply to possession of child pornography, it would have created a section specifically addressing that crime. This argument is without merit. The section of the restitution statute concerning rape of a child, RCW 9.94A.753(6), specifies that, where a child rape victim becomes pregnant, restitution must include all of the victim's medical expenses and support for a child born as a result of the rape. RCW 9.94A.753(6). The provision has no bearing on application of the restitution statute to the crime of possession of child pornography.

The State must produce substantial evidence to support a claim of loss. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (citing State v. Fleming, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994)). If a defendant disputes the amount of restitution, the State must prove the damages by a preponderance of the evidence. Id. (citing Kinneman, 155 Wn.2d at 285). Evidence is sufficient if it affords a reasonable basis to estimate the loss and does not depend on "'mere speculation or conjecture.'" Id. (quoting State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005)). The State need not establish the amount of loss "with specific accuracy." Kinneman, 155 Wn.2d at 285.

In this case, the trial court considered evidence of the losses Vicky suffered as a result of the ongoing distribution of her images. The evidence included psychological reports diagnosing post-traumatic stress disorder and documenting her need for counseling; account statements showing her counseling expenses; victim impact letters; and an economist's calculation of lost wages. Vicky calculated her actual losses for counseling and lost wages at $246,658. She requested restitution in the amount of $5000 as a reasonable apportionment for Velezmoro's share in her injury.

Prior to the restitution hearing, Velezmoro disputed Vicky's calculation, arguing that losses incurred before his charged offense could not properly be included. Vicky disputed this position, but submitted a second calculation showing her post-offense losses at $183,819.

Velezmoro also asserted that Vicky had already received restitution for the full amount of her losses from other defendants. In response, Vicky noted that,

unlike the Washington statute, the federal restitution statute allows for recovery of future lost wages, litigation expenses, and attorney's fees. She stated her losses under the federal statute amounted to $1,084,053. She had been awarded $692,548 in federal restitution and had approximately $391,500 in unrecovered losses. Comparing the amounts eligible under the Washington and the federal statutes, Vicky calculated that Washington allowed restitution for 17 per cent of the losses eligible under the federal statute. Vicky applied the same ratio to her uncompensated losses and determined that the portion of unrecovered losses eligible for restitution in Washington amounted to $66,085. Her request for $5000 restitution as a reasonable apportionment from Velezmoro remained unchanged.

The trial court awarded $5000 in restitution. The trial court stated that it was awarding restitution as recovery for Vicky's actual losses and that it found $5000 to be a reasonable apportionment for Velezmoro's share in those losses.

Velezmoro argues that the trial court abused its discretion because the $5000 was a speculative amount. He relies on cases in which courts have reversed an award of restitution because the State failed to prove a causal connection between the amount of restitution ordered and the defendant's specific offense. For example, in Griffith, the victims lost valuables including several expensive pieces of jewelry in a home burglary. Griffith, 164 Wn.2d at 962-63. Griffith sold a pearl necklace taken in the burglary to a pawnshop and, based on the incident, pleaded guilty to trafficking in stolen property. Id. at 963. The trial court ordered Griffith to pay $11,500 as restitution for all of the victims' missing jewelry. Id. at 964. But the Supreme Court reversed because the State

had produced no evidence that Griffith possessed the victims' unrecovered rings and necklaces. Id. at 967. See also State v. Dedonado, 99 Wn. App. 251, 991 P.2d 1216 (2000) (reversing an award of restitution where the State did not show a causal connection between the defendant's offense and the damages).

Velezmoro's cases are inapposite because they do not address the circumstances of this case. In following the Paroline approach, the trial court must use its discretion to award restitution for a share of the victim's losses. The Paroline Court declined to "prescribe a precise algorithm for determining the proper restitution," but held that the trial court should assess "an individual defendant's role in the causal process behind a child-pornography victim's losses. . . ." Paroline, 134 S.Ct. at 1728. The Paroline Court suggested "a variety of factors district courts might consider" in assessing restitution, including the number of past defendants found to have contributed to the victim's losses, the broader number of offenders involved, reasonable predictions of the number of future offenders likely to be convicted, and how many images of the victim the defendant possessed. Id. But the Court emphasized that these factors were merely "rough guideposts." Id. In remanding for assessment of restitution, the Court instructed that the award should be more than a "token" but should not be "severe." Id. at 1727.

In this case, the trial court considered evidence establishing the amount of Vicky's losses caused by the ongoing distribution of her images. The court inquired as to the amount of unrecovered losses. The trial court exercised its discretion and found $5000 to be a reasonable share of Vicky's losses

considering Velezmoro's role in creating a market for Vicky's images. The amount is less than 10 per cent of Vicky's unrecovered loss eligible for restitution under Washington law. The award is based on proper grounds and is not manifestly unreasonable. We conclude that the trial court did not abuse its discretion.

But Velezmoro asserts that the trial court abused its discretion even under the Paroline approach. He argues that the trial court failed to consider the factors enumerated in Paroline and thus failed "to engage in the sort of calculation required by that decision." App. Br. at 13-14. We reject this argument because the Paroline Court expressly and repeatedly declined to fix a "rigid formula" for assessing restitution. Paroline, 134 S.Ct. at 1728. While the Paroline Court proposed factors for the trial court to consider, it notably did not require the trial court to weigh these factors on the record.

Velezmoro next argues that the trial court abused its discretion in relying on Vicky's calculations. He contends that Vicky's calculations are inapposite because she fails to prove the share of her damages caused by possession of her images in Washington. He also asserts that the restitution Vicky has already received has more than compensated her for those losses allowable under Washington law, so that she has no unmet loss.

Velezmoro's argument is untenable because, in a case where child pornography has been distributed to an unknown number of viewers throughout the country and internationally, it is impossible to determine the share of the

victim's damages caused by Washingtonians. And it is unclear why Velezmoro would have restitution ordered under federal law apply first to damages eligible under Washington law, so that Vicky has no unmet loss in Washington. We reject Velezmoro's arguments concerning Vicky's calculations.

Finally, Velezmoro argues that, if he does not prevail, this court should not authorize any costs of appeal. This court may require an appellant in a criminal case to pay appellate costs. RCW 10.73.160(1). We may consider appellate costs when the appellant raises the issue in briefing. State v. Sinclair, 192 Wn. App. 380, 385, 367 P.3d 612, rev. denied, 185 Wn.2d 1034, 377 P.3d 733 (2016). When the trial court has determined that the appellant is indigent, indigency is presumed to continue throughout the appeal. Id. at 393.

The trial court determined that Velezmoro was indigent. The State makes no argument concerning appellate costs and presents no evidence to rebut the presumption that Velezmoro is indigent. We decline to award costs of appeal to the State.

Affirmed.

Spearman, J.

WE CONCUR:

Becker, J.

NIELSEN, BROMAN & KOCH, PLLC

November 22, 2016 - 1:32 PM

Transmittal Letter

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Case Name: John Velezmoro
Court of Appeals Case Number: 73542-0

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