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NO. 64194-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

APRIL DAVIS,

Appellant.

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

The Honorable Andrea Darvas, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A.	<u>FACTS IN REPLY</u>	1
B.	<u>ARGUMENT IN REPLY</u>	2
	1. THE EVIDENCE WAS INSUFFICIENT TO PROVE CAUSATION BETWEEN THE LOSSES ORDERED PAID IN RESTITUTION AND "THE CRIME IN QUESTION."	2
	2. THIS CASE IS DISTINCT FROM THOSE ON WHICH THE STATE RELIES. MS. DAVIS DOES NOT CLAIM THE RESTITUTION IS LIMITED TO THE REDUCED CHARGE TO WHICH SHE PLED, BUT IT IS LIMITED TO THE ACTUAL CRIME CHARGED.	5
	a. <u>State v. Selland</u>	5
	b. <u>State v. Landrum</u>	7
	c. <u>State v. Thomas</u>	8
	d. <u>Ms. Davis Does Not Claim Her Plea to a Lesser Offense Precludes Restitution.</u>	9
	3. THE CASE MUST BE REMANDED TO DETERMINE THE PROPER AMOUNT OF ATTORNEY FEES AND COSTS.	10
C.	<u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Ashley,
40 Wn. App. 877, 700 P.2d 1207 (1985) 6, 7

State v. Berman,
50 Wn. App. 125, 747 P.2d 492 (1987),
review denied, 110 Wn.2d 1019 (1988) 6, 7

State v. Griffith,
164 Wn.2d 960, 195 P.3d 506 (2008) 9

State v. Israel,
113 Wn. App. 243, 54 P.3d 1218 (2002),
review denied, 149 Wn.2d 1015 (2003) 12

State v. Kinneman,
155 Wn.2d 272, 119 P.3d 350 (2005) . . . 3, 10, 12

State v. Landrum,
66 Wn. App. 791, 832 P.2d 1359 (1992) . . . 5, 7, 9

State v. Mark,
36 Wn. App. 428, 675 P.2d 1250 (1984) 6, 7

State v. Selland,
54 Wn. App. 122, 772 P.2d 534,
review denied, 113 Wn.2d 1011 (1989) . . . 5-7, 9

State v. Taylor,
86 Wn. App. 442, 936 P.2d 1218 (1997) 8

State v. Thomas,
138 Wn. App. 78, 155 P.3d 998 (2007) . . . 2, 5, 8, 9,
12

TABLE OF AUTHORITIES (cont'd)

STATUTES AND OTHER SOURCES

Constitution, art. I, § 3	2
RCW 9.92.060(2)	1, 2
RCW 48.30.280	1
RCW 48.80.030	1
United States Constitution, amend. 14	2

A. FACTS IN REPLY

The state does not argue, and the record does not support, that Ms. Davis agreed to pay restitution for an "offense or offenses which [were] not prosecuted pursuant to a plea agreement." RCW 9.92.060(2).

The plea agreement specifically provides:

- [x] RESTITUTION: The defendant shall pay restitution in full to the victim(s) **on charged counts** and
- [x] agrees to pay restitution in the specific amount of \$ TBD - [Defendant] must pay \$40,000 toward restitution prior to plea; hearing will be set to determine the remainder.

CP 29 (bold emphasis added).

The only crime charged was [Filing a] Fraudulent Insurance Claim, RCW 48.30.280(1) and (2)(a). CP 1-9. By agreement, the state accepted a plea to one count of Attempt to File Fraudulent Insurance Claim. CP 10,¹ 20-28.

The only crime discussed in the Certification for Determination of Probable Cause is Making False Claims in Violation of the Health Care False Claims Act, RCW 48.80.030. CP 2-9, 20-28. The detective

¹ The Amended Information in fact repeats the original charge of Filing a Fraudulent Insurance Claim. CP 10.

believed there was documentation to support multiple false claims made between 2003 and 2007. CP 8, 27. Yet the state agreed to charge only one count of a variation on that crime.

B. ARGUMENT IN REPLY

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE CAUSATION BETWEEN THE LOSSES ORDERED PAID IN RESTITUTION AND "THE CRIME IN QUESTION."

The restitution statute permits restitution for "loss or damage by reason of the commission of the crime in question." RCW 9.92.060(2).

Where the defendant has not agreed to the amount of restitution, the state bears the burden of proving by a preponderance of the evidence that the claimed loss was caused by the crime. State v. Thomas, 138 Wn. App. 78, 83, 155 P.3d 998 (2007); U.S. Const., amend. 14; Const., art. I, § 3 (due process clauses).

In this case, the evidence is insufficient as a matter of law to support a finding that the losses ordered in restitution were caused by the crime of filing a false insurance claim.

Restitution is allowed only for losses that are causally connected to a crime, and may not be imposed for a "general scheme," acts "connected with" the crime charged, or uncharged crimes unless the

defendant enters into an express agreement to pay restitution in the case of uncharged crimes.

State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d 350 (2005). Yet this is precisely the argument the state makes: that Ms. Davis should pay restitution for her "general scheme" and acts "connected with" the crime charge.

In no uncertain terms, the defendant "cooked the books" causing substantial losses to Doctor Butterfield.

Brief of Respondent (Resp. Br.) at 10. The state did not charge Ms. Davis with "cooking the books." The state did not charge Ms. Davis with theft by deception, embezzlement, or any other similar crime.

A bookkeeper can misallocate funds among various clients, wreaking havoc with the accounts and causing great expense and perhaps loss. Doing so does not necessarily involve criminal behavior. See Certification for Determination of Probable Cause at 2:

The [audit] report showed 6 different categories of "Inaccurate" postings, starting from 2002 through February 2007. The total dollar amount of "Inaccurate" and "Misallocated" was listed as \$77,386.47. **This report, alone, does not substantiate a crime**

CP 21 (emphasis added). In her civil complaint against Ms. Davis for damages, Dr. Butterfield has not alleged a crime. Brief of Appellant at 7 n.2.

In the vast majority of such cases, the bookkeeper is embezzling and "cooking the books" to hide the theft. Personal gain is the main purpose; theft is the criminal method; and the chaos is to conceal the crime and continue the personal gain.

This case is an anomaly. Ms. Davis certainly messed up the books. But there was no embezzlement or personal gain.

Although Dr. Butterfield claimed Ms. Davis had forged her ex-husband's signature, Resp. Br. at 7, the state did not charge Ms. Davis with forgery either. Dr. Butterfield's testimony was far from conclusive in implicating Ms. Davis:

Q. And what leads you to believe that she did that?

A. Well, who else could have done that?

Dr. Butterfield was not sure in whose account the checks had been deposited. The state provided no documentation of the doctor's claims which, even if admitted, totaled "under \$1,500." RP(6/5) 47-50.

There is only one possible "crime in question" that supports restitution: filing a false

insurance claim. Any other losses from any other acts cannot be ordered in restitution.

2. THIS CASE IS DISTINCT FROM THOSE ON WHICH THE STATE RELIES. MS. DAVIS DOES NOT CLAIM THE RESTITUTION IS LIMITED TO THE REDUCED CHARGE TO WHICH SHE PLED, BUT IT IS LIMITED TO THE ACTUAL CRIME CHARGED.

The state cites State v. Landrum, 66 Wn. App. 791, 832 P.2d 1359 (1992), State v. Selland, 54 Wn. App. 122, 772 P.2d 534, review denied, 113 Wn.2d 1011 (1989), and State v. Thomas, supra, to support its argument that restitution is not "limited by the definition of the crime." Resp. Br. at 9. These cases do not support the state's position in this case.

- a. State v. Selland

In Selland, a juvenile case, the defendant was convicted of third degree malicious mischief for exploding firecrackers that blew a hole in the side of a mobile home. By definition, the crime was limited to causing damage of no more than \$250. The court ordered restitution of \$552.81 for damages. On appeal, the defendant argued the statutory definition of the crime of conviction limited the amount of restitution the court could order.

The Court of Appeals disagreed. "Selland has been ordered to pay restitution only for the damages caused by the offense for which he was charged." Id., 54 Wn. App. at 124.

The Selland court carefully distinguished the cases of State v. Berman, 50 Wn. App. 125, 747 P.2d 492 (1987), review denied, 110 Wn.2d 1019 (1988); State v. Ashley, 40 Wn. App. 877, 700 P.2d 1207 (1985); and State v. Mark, 36 Wn. App. 428, 675 P.2d 1250 (1984). The distinctions are instructive for this case.

In Berman, the defendant had accepted money from a customer on two separate occasions to furnish computer software but failed to perform. The state charged and convicted the defendant of only one of the incidents. The trial court ordered restitution for both transactions. The Court of Appeals reversed, holding it was error to order an amount beyond the crime for which he was charged.

In Ashley, the defendant committed two separate assaults but was only charged and convicted for one. The Court of Appeals held the trial court could order restitution only for the injuries caused by the offense charged.

In Mark, the defendant was charged with grand larceny committed over a 13-month period, but was ordered to pay restitution for acts covering a 3-year period. The Court of Appeals reversed, holding restitution was limited to the property stolen during the 13-month period. Selland, 54 Wn. App. at 123-24.

The court ordered Selland to pay all the damages from his single criminal act, the "crime in question," malicious mischief. But Berman, Ashley, and Mark prohibited restitution for other criminal acts not charged or convicted, even if they were similar to or entwined with the crime charged.

b. State v. Landrum

In Landrum, also a juvenile case, the respondents pleaded guilty to assault in the fourth degree, reduced from child molestation in the first degree. The court ordered restitution for the victims' counseling costs and medical examinations. The Court of Appeals affirmed, holding the Alford plea incorporated the police report, and the court could rely on the police report to find the "assault" caused the counseling and medical examination.

c. State v. Thomas

In State v. Thomas, supra, the defendant was charged with vehicular assault for a one-car accident in which her passenger was injured. A jury convicted her of the lesser offense of DUI. Nonetheless, the court ordered restitution for the passenger's medical expenses. She appealed, claiming the jury acquitted her of causing the injuries.

The Thomas court noted:

A restitution award must be based strictly on the "crime in question," the one for which the defendant was convicted, not other crimes.

138 Wn. App. at 82. The Court of Appeals affirmed, although the three judges from Division Two could not agree on the reasoning. It found sufficient evidence by a preponderance that the DUI caused the accident, and so the injuries.²

² These two judges acknowledged this conclusion conflicted with Division One's opinion in State v. Taylor, 86 Wn. App. 442, 936 P.2d 1218 (1997). In Taylor, a jury found the defendant guilty of second degree theft for welfare fraud, instead of the greater charge of first degree theft, necessarily finding he stole less than \$1,500. The Court of Appeals held the crime of conviction did not establish an underlying criminal act that could support restitution greater than \$1,500. Since the defendant's eligibility for benefits varied over the charging period, the Court

d. Ms. Davis Does Not Claim Her Plea to a Lesser Offense Precludes Restitution.

Unlike Selland, Landrum and Thomas, appellant here does not claim the difference between the charge of "Filing a False Insurance Claim" and her plea to "Attempting to File a False Insurance Claim" precludes the restitution ordered. Instead, here there was no evidence to show the enormous amount of restitution resulted from the crime charged, instead of from disruptive, disobedient, or even negligent but non-criminal behavior. In any event, no other criminal behavior was charged.

The state also cites State v. Griffith, 164 Wn.2d 960, 195 P.3d 506 (2008), for the very general proposition of "but for" causation. Resp. Br. at 9. The "but for" causation is required, but not sufficient to order restitution. The loss still must result from the "crime in question," not just any act the defendant committed. The facts and holding of Griffith support Ms. Davis's position in this case. See Brief of Appellant at 13-14.

concluded the jury must have found him ineligible for part of the charging period.

3. THE CASE MUST BE REMANDED TO DETERMINE THE PROPER AMOUNT OF ATTORNEY FEES AND COSTS.

Attorney fees and costs may constitute damages on which restitution may be based, depending on the circumstances. ... However, restitution is improper if the fees are not sufficiently connected to the offense.

Kinneman, 155 Wn.2d at 288. In this case, any award of attorney's fees and costs must be apportioned according to the amount of loss caused by the "crime in question."

The state claims Dr. Butterfield hired counsel to help her with the investigation, which "continued well after the initial forensic evaluation was complete," in fact, until the last restitution hearing. Resp. Br. at 21. But this "ongoing investigation" proves appellant's point: Dr. Butterfield was investigating for a civil lawsuit against Ms. Davis. The "crime in question" had been charged and resolved before the first restitution hearing. Even the state agrees the attorney completed his report on June 1, 2009, before the first restitution hearing. Resp. Br. at 4 n.4. No additional information, except an increase in attorneys and accounting fees, was presented.

Counsel below made it clear he objected to the question of whether the loss for which the court ordered restitution was in fact caused by Ms. Davis's crime. In agreeing the court could review the Amended Appendix A, counsel merely agreed to its admissibility, not to its contents or that it demonstrated causation for any and all amounts. Resp. Br. at 18; RP(8/14) at 5.

The issue in this case is controlled by the facts. The state claims:

In short, Doctor Butterfield provided services in which she charged a fee. The defendant prevented Doctor Butterfield from obtaining payment for her services. The trial court did not abuse its discretion in ordering restitution for the services provided that were never compensated but for the defendant's criminal actions.

Brief of Respondent at 15.

To the extent that Ms. Davis filed false insurance claims, she does not contest the order of restitution.

Failing to mail patients' bills is not filing a false insurance claim. Misallocating funds from one patient's account to another's is not filing a false insurance claim. Deleting a service provided from a bill is not filing a false insurance claim.

The state refers to "theft of services" by analogy. Resp. Br. at 14. The state never charged or suggested a charge of "theft of services" in this case.

The state's argument has no support from State v. Israel, 113 Wn. App. 243, 54 P.3d 1218 (2002), review denied, 149 Wn.2d 1015 (2003). Resp. Br. at 10, 14. Mr. Israel was convicted of conspiracy. His restitution order properly encompassed all losses connected with any aspect of the conspiracy. The state did not charge Ms. Davis with conspiracy.

C. CONCLUSION

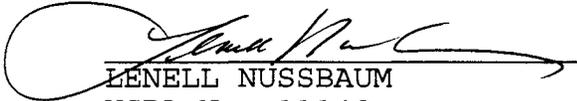
If a trial court applies an incorrect legal analysis, it abuses its discretion. State v. Kinneman, supra, 155 Wn.2d at 289. If the evidence is insufficient to prove causation by the "crime in question," the restitution order must be reversed. Thomas, supra. If causation is established for a portion but not all of the restitution award, this Court must reverse the unsupported portion.

In this case, this Court should vacate the restitution ordered payable to Dr. Butterfield, and remand with direction to apportion the amount of legal and accounting fees to those caused by the

"crime in question," and not by other bookkeeping discrepancies.

DATED this 16th day of July, 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 64194-8-I
)	
vs.)	DECLARATION OF SERVICE
)	
APRIL LOUISE DAVIS,)	
)	
Appellant.)	
)	

LENELL NUSSBAUM declares:

On this date I served a copy of each of the following documents:

Reply Brief of Appellant and this Declaration of Service by depositing the same, postage prepaid, in the United States Mail, addressed to:

Mr. Dennis J. McCurdy
King County Prosecutor's Office
Appellate Unit Supervisor
516 Third Ave. W-554
Seattle, WA 98104

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct.

07/16/2010
Date and Place

Alex Fast
ALEXANDRA FAST