73710-4

FILED
Dec 30, 2015
Court of Appeals
Division I
State of Washington

No. 73710-4-I

IN THE COURT OF APPEAL OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

AYANNA SHAMARI,

Appellant.

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

The Honorable Roger S. Rogoff

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 2

The State failed to prove the amount of restitution to the Crime Victim's Compensation Program. 2

1. *The State bears the burden of proving the amount of restitution.* 2

2. *The amount of restitution may not be based on conjecture or speculation.* 3

3. *Where the State fails to prove the amount of restitution, the remedy is to strike the amount of restitution.* 5

E. CONCLUSION 6

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Awawdeh, 72 Wn.App. 373, 864 P.2d 965 (1993), *review denied*, 124 Wn.2d 1004, *cert. denied*, 513 U.S. 970 (1994) 3

State v. Bunner, 86 Wn.App. 158, 936 P.2d 419 (1997) 4

State v. Dennis, 101 Wn.App. 223, 6 P.3d 1173 (2000)..... 4, 5

State v. Fleming, 75 Wn.App. 270, 877 P.2d 243 (1994)..... 3

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

State v. Johnson, 69 Wn.App. 189, 847 P.2d 960 (1993) (*per curiam*) . 3

State v. Kinneman, 122 Wn.App. 850, 95 P.3d 1277 (2004) *aff'd*, 155 Wn.2d 272, 119 P.3d 350 (2005)..... 4, 5

State v. Martinez, 78 Wn.App. 870, 899 P.2d 1302 (1995), *review denied*, 128 Wn.2d 1017 (1996) 2, 3

State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999)..... 5

State v. Pollard, 66 Wn.App. 779, 834 P.2d 51 (1992)..... 3

State v. Tobin, 161 Wn.2d 517, 166 P.3d 1167 (2007) 4

STATUTES

RCW 9.94A.753 ..... 2, 3

A. ASSIGNMENT OF ERROR

The trial court erred in imposing restitution in the amount of $32,835.97 in the absence of sufficient evidence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The State bears the burden of proving the amount of restitution. The summary list of medical expenditures does not provide the requisite proof. Here, the State provided only a summary of list medical expenditures without more in requesting restitution be awarded to the Crime Victim's Compensation Program. Nevertheless, the court awarded restitution based on this record. Is Ms. Shamari entitled to reversal and vacation of the restitution award to the Crime Victim's Compensation Program where the State failed to carry its burden of proof and the court's award is based solely on speculation?

C. STATEMENT OF THE CASE

Ayanna Shamari pleaded guilty to one count of first degree assault with a firearm enhancement, one count of second degree assault with a firearm enhancement, and one count of reckless burning. CP 10.

The State subsequently sought restitution in the amount of $33,446.98; $32,835.97 to the Crime Victim's Compensation and $611.01 to the Health Care Authority. CP 71-89. The Health Care

Authority documentation included a detailed list of the amount billed, the diagnosis and subsequent treatment that was provided. CP 77-78. On other hand, the Crime Victim's Compensation Program documentation consisted of a single list of expenditures without any detail on why the service was provided. CP 79.

Ms. Shamari waived a hearing and the trial court imposed the total amount of restitution requested. CP 90-91.

D. ARGUMENT

The State failed to prove the amount of restitution to the Crime Victim's Compensation Program.

1. *The State bears the burden of proving the amount of restitution.*

A court's authority to impose restitution is derived solely from statute. *State v. Martinez*, 78 Wn.App. 870, 881, 899 P.2d 1302 (1995), *review denied*, 128 Wn.2d 1017 (1996). RCW 9.94A.753(5) provides that "[r]estitution 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."

"If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence." *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). While certainty of

damages need not be proved with specific accuracy, the evidence must be sufficient to provide a reasonable basis for estimating loss. *State v. Pollard*, 66 Wn.App. 779, 785, 834 P.2d 51 (1992). Evidence that subjects the trier of fact to speculation or conjecture is insufficient. *Pollard*, 66 Wn.App. at 785.

"[C]ompensation is not the primary purpose of restitution, and the criminal process should not be used as a means to enforce civil claims." *Martinez*, 78 Wn.App. at 881.

2. *The amount of restitution may not be based on conjecture or speculation.*

Restitution must be based upon easily ascertainable damages, in other words, the court finds there is a causal connection between the crime proved and the injuries suffered. RCW 9.94A.753 (3); *State v. Fleming*, 75 Wn.App. 270, 274, 877 P.2d 243 (1994); *State v. Johnson*, 69 Wn.App. 189, 190, 847 P.2d 960 (1993) (*per curiam*). "While damages need not be proved with certainty, the evidence of damages must be sufficient to afford a reasonable basis for estimating the loss and must not subject the trier of fact to mere speculation or conjecture." *State v. Awawdeh*, 72 Wn.App. 373, 379, 864 P.2d 965 (1993), *review denied*, 124 Wn.2d 1004, *cert. denied*, 513 U.S. 970 (1994). A causal connection exists if "but for" the offense, the loss or damages to the

victim would not have occurred. *State v. Tobin,* 161 Wn.2d 517, 519, 524-25, 166 P.3d 1167 (2007). The State must prove this causal connection between the expenses and the offense by a preponderance of the evidence. *State v. Kinneman,* 122 Wn.App. 850, 860, 95 P.3d 1277 (2004) *aff'd,* 155 Wn.2d 272, 119 P.3d 350 (2005).

A causal connection is not established simply because a victim or insurer submits proof of expenditures. *State v. Dennis,* 101 Wn.App. 223, 226, 6 P.3d 1173 (2000). "This is because it is often not possible to determine from such documentation whether all the costs incurred were related to the offender's crime." *Id.*

Here, the only documentation provided is a summary list of expenditures for medical treatment without an indication of why the services were provided. A summary of medical treatment that does not indicate why medical services were provided "fails to establish the required causal connection between the victim's medical expenses and the crime committed." *State v. Bunner,* 86 Wn.App. 158, 160, 936 P.2d 419 (1997).

Thus, the amount awarded to the Crime Victim's Compensation Program was wholly speculative and not based upon proof in the

record. The court's award was not supported by the proof provided and was erroneous.

3. *Where the State fails to prove the amount of restitution, the remedy is to strike the amount of restitution.*

The remedy for the State's failure to carry its burden of proving the amount of restitution where the defendant has posited a specific objection is to strike the restitution amount in question:

> Moreover, if the State fails to establish a causal connection between defendant's actions and the damages, this court must vacate the restitution order. *Dedonado,* 991 P.2d at 1219. The reason for this rule is that the State must not be given a further opportunity to carry its burden of proof after it fails to do so following a specific objection. *Cf. State v. McCorkle,* 137 Wn.2d 490, 496, 973 P.2d 461 (1999) (refusing to allow the State to introduce new evidence on remand to prove defendant's prior out-of-state convictions after the State failed to carry its burden of proof at sentencing).

Dennis, 101 Wn.App. at 229-30. *Cf. Kinneman*, 122 Wn.App. at 861-62 (usual remedy for the State's failure to prove amount of restitution is vacation of the award of restitution).

Here, the State's documentation failed to establish the requisite casual connection. In light of the State's failure of proof, Ms. Shamari asks this Court to vacate the award of restitution in the amount of $32,835.97.

E. CONCLUSION

For the reasons stated, Ms. Shamari asks this Court to strike the court's award of restitution to the Crime Victim's Compensation Program for the State's failure to carry its burden of proof.

DATED this 30th day of December 2015.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)
Washington Appellate Project – 91052
1511 Third Avenue, Suite 701
Seattle, WA. 98101
(206) 587-2711
Fax (206) 587-2710
tom@washapp.org
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 73710-4-I
v.	)	
	)	
AYANNA SHAMARI,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] AYANNA SHAMARI 379450 WACC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF DECEMBER, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710