

NO. 74437-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JACOB GREGAN,

Appellant.

FILED

August 8, 2016

Court of Appeals

Division I

State of Washington

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIA L. GARRATT

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**BRIEF OF RESPONDENT**

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A. ISSUES

1. Whether the trial court properly imposed restitution when the evidence established a causal connection between Gregan's assault and Shier's injuries.

2. Appellate costs should not be foreclosed when there has been no finding on Gregan's future ability to pay or ability to pay over time.

B. STATEMENT OF THE CASE

Jacob Gregan was charged with Assault in the Second Degree - Domestic Violence and Assault in the Third Degree. CP 1. He pled guilty to the amended charge of Assault in the Fourth Degree on 6/15/2015. CP 9-17.

On 2/13/2015, the Seattle Police department received a call from a concerned neighbor reporting that from the hallway she could hear the victim, Breann Walker, crying for help and struggling to breathe. CP 3-4. Breann Walker had been in the apartment of her ex-boyfriend, the defendant, Jacob Gregan, to retrieve some of her belongings from their breakup. CP 3. While they were talking, Gregan got mad and shoved the victim down onto his bed, where he held her down and she was unable to get up. CP 3. Gregan hit

Walker in the head several times with his free hand. CP 4. She was afraid and began yelling for help when Gregan then covered her mouth with his hand, restricting her ability to breathe. CP 4. She freed herself by biting his hand, and then fled into the hallway. CP 4.

Gregan pursued Ms. Walker until he saw the patrol officers as they arrived. CP 3. Seattle Police Officers Shier, Hill, and Carey contacted Gregan in the stairwell and he fled. CP4. The officers ordered Gregan to stop but he continued out of the stairwell and onto a side street. CP 4. When the officers caught up with him, he initially raised his hands as if to surrender. CP 4. As Shier grabbed onto Gregan to take him into custody, Gregan charged him with his shoulder and head-butted Shier on the left side of Shier's head with such force that his head snapped back. CP 4. The officer saw a flash of light and was later taken to a hospital for evaluation. CP 4. Gregan ran from the officers but was stopped a block away where it took four officers to place him in handcuffs, as he violently moved his arms and legs during arrest. CP 4.

All four of the arresting officers were treated at Harborview Medical Center for injuries they received during the arrest. CP 4. Victim Walker complained of pain on her right index finger, pain on

her left shoulder, pain on the top left of her head, pain on her neck, and pain all around her face and mouth. CP 4. Victim Shier complained of feeling “dazed” after being struck in the head by Gregan. CP 4. Gregan in his own words stated, “I also intentionally hit Officer Shier on the forehead when I was being arrested.” CP 16.

In his plea agreement, Gregan stipulated that the facts set forth in the Certification for Determination of Probable Cause were real and material facts for the purposes of sentencing. CP 22. The guilty plea also included a provision obligating Gregan to pay restitution “to any victims who lost money or property as a result of crimes I committed.” CP 11. The trial court imposed financial obligations to include restitution in an amount to be determined at a subsequent hearing. CP 23-24. A separate hearing was scheduled to determine the amount of restitution.

At the restitution hearing on 11/15/2015, the State submitted four documents: 1) City of Seattle – Worker’s Compensation ATS Payment Report (CP 32); 2) OCCUPATIONAL HEALTH SVC RENTON – Health Insurance Claim Form (CP 33); 3) HARBORVIEW MEDICAL CENTER – Health Insurance Claim Form (CP 34); and 4) OCCUPATIONAL HEALTH SVC RENTON –

Health Insurance Claim Form (CP 35). Each form clearly identified treatment provided for injuries suffered on 2/13/2015, and work time lost between 2/17/2015 – 2/22/2015.

Gregan's argument is premised on the fact that a box checked on the third form (CP 34) suggests treatment was provided for another incident.

C. ARGUMENT

1. THE EVIDENCE ESTABLISHED A CAUSAL CONNECTION BETWEEN GREGAN'S ASSAULT AND SHIER'S INJURIES.

Gregan claims that the State failed to meet its burden of presenting substantial evidence of a causal connection between the injuries and Gregan's assault. He argues that the evidence was insufficient to establish a link between Shier's expenses and Gregan's assault, because a box checked called "OTHER ACCIDENT" is checked on one form and not another. Gregan claims this means Shier was treated for two different injuries. His argument should be rejected. The most reasonable inference from the totality of the evidence was that Gregan caused the victim's injuries on 2/13/2015. There was no evidence of any other injury or treatment.

When the particular type of restitution in question is authorized by statute, imposition of restitution is within the discretion of the trial court and will not be disturbed on appeal absent abuse of discretion. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). A trial court's power to order restitution is statutory. Id.

The controlling statute here reads, in relevant part, as follows:

- (1) ... 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 ....
- (2) Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person ... unless extraordinary 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....

RCW 9.94A.753. The statute is designed to promote respect for the law by providing punishment that is just. Id. at 922.

"While restitution must be based on 'easily ascertainable damages,' the amount of harm or loss need not be established with specific accuracy." State v. Kinneman, 155 Wn.2d 272, 285, 119

P.3d 350 (2005). Still, the claim must be supported by “substantial credible evidence.” State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (quoting State v. Flemming, 75 Wn. App. 270, 274-75, 877 P.2d 243(1994)). “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.” Kinneman, 155 Wn.2d at 285.

“[R]estitution is allowed only for losses that are ‘causally connected’ to the crimes charged.” State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). Restitution is proper when a causal connection exists between the crime and the injuries for which compensation is sought. State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000). Causation is determined by applying the “but-for” test. Tobin, 162 Wn.2d at 524. Losses are causally connected if, “but for” the charged crime, the victim would not have incurred the loss. Id. “In determining whether a causal connection exists, we look to the underlying facts of the charged offense.” State v. Landrum, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992). In this case, “but for” Gregan’s assault Shier would not have been injured. In applying the “but-for” test the trial court appropriately awarded restitution.

The State provided evidence that established a causal connection between Gregan's assault and the injuries sustained by Shier. Gregan's guilty plea established that on 2/13/2015 he head-butted Shier and caused injuries, after which Shier sought medical treatment. Gregan promised to pay for the treatment costs resulting from the injury. To establish Shier's costs, the State provided four documents including a Workers' Compensation Benefits claim form that specifically says the treatment is for "benefits paid under the workers' compensation for injuries sustained on 2/13/2015." CP 31. The Workers' Compensation Benefits claim form provided an itemized payment history for Shier's time loss between 2/17/2015 and 2/22/2015 for \$1,037.82. This is approximately 80% of Officer Shier's usual pay for that time period, plainly showing that Shier is being reimbursed for time lost only during that period. CP 32. Additionally, the State provided three separate health insurance claims forms, each identifying the date of the covered injury as 2/13/2015. CP 33-35. The medical bills need only show that the treatment received was for injuries that occurred on 2/13/2015. This evidence established a causal connection between Gregan's assault and the injuries that Shier suffered.

Gregan argues for the first time on appeal that because one medical institution checked a different box, there were really two separate incidents being claimed, not just one. He is mistaken; the three claims forms from the medical institutions all indicate that the claims are for injuries that occurred on 2/13/2015. CP 33-35.

10. PATIENT'S CONDITION RELATED TO:	
a. EMPLOYMENT? (Current or Previous)	
<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO
b. AUTO ACCIDENT?	
<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
	PLACE (State)
c. OTHER ACCIDENT?	
<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO

CP 34. Because the text box issue was never raised below, there was no discussion on that point. Suffice it to say, that any confusion about the checked box does not undermine the court's finding that restitution was ordered for injuries incurred on 2/13/2015. The checked box is wholly subjective and ambiguous. Two people could check the box "OTHER ACCIDENT" differently. A person *could* check the box "no" because Shier's injury was not an "accident" at all; i.e., Gregan stated in his own words, "I also intentionally hit Officer Shier on the forehead when I was being

arrested.” CP 16. However, a person *could* also check the box “yes” because they believed an intentional assault falls under “OTHER ACCIDENT”; i.e., not an “Auto” accident. In any event, the evidence produced establishes a causal connection between the assault and the injuries, and a single ambiguous box checked does not undermine this connection. The judge had a right to conclude that Shier’s injury was a result of Gregan’s assault on 2/13/2015.

The evidence submitted from three State of Washington agencies identifies the date of injury as 2/13/2015. The first, an email from Taren Beck, the Workers’ Compensation Claims Analyst for the City of Seattle, Department of Human Resources, outlines compensation for the injuries that occurred on 2/13/2015.

CP 31-32. The second and third documents are “Health Claim Forms” from Occupational Health SVC Renton and the documents specifically indicate treatment for the injuries that occurred on 2/13/2015. CP 33, 35. The third piece of evidence was the “Health Claim Forms” from Harborview Medical Center and it specifically indicates treatment for the injuries that occurred on 2/13/2015.

CP 34.

Gregan relies on State v. Bunner, 86 Wn. App. 158, 936 P.2d 419 (1997), to support his argument that there was insufficient evidence to establish a link between Shier's medical and missed work expenses and Gregan's assault. Gregan's argument should be rejected. Bunner was convicted of second degree rape of a child and ordered to pay restitution. The sole evidence presented at the restitution hearing was a DSHA medical recovery report listing medical services charges the State had paid. Id. The report itemized amounts the State paid for the victim's medical treatments and counseling; there were several providers listed. Id. This summary did not indicate why medical services were provided, so it fails to establish the required causal connection between the victim's medical expense and the crime committed. Id. at 420. The State conceded that this report was not enough to establish a causal connection between the crime and the victim's damages but argued that the Presentence Investigation Report (PSI) was sufficient for the court to affirm. Id. at 419. However, the State did not present the PSI report at the restitution hearing. Id. Thus, the Court did not consider the PSI report because Bunner had no opportunity to contest it and without it, the State failed to present sufficient evidence that the service provided related to the crimes

committed. Id. at 420. In short, the evidence failed to establish why certain expenses were paid. Id.

Unlike Bunner, the evidence presented here establishes a causal connection between Gregan's assault and Shier's medical and missed work expenses. Both the Workers' Compensation Claims and the Health Insurance Claims form from Occupational Health SVC Renton and Harborview Medical Center show that treatment was for injuries sustained on 2/13/2015. CP 31-35. Here, the State provided sufficient evidence to connect Gregan's assault to Shier's injuries.

2. APPELLATE COSTS SHOULD NOT BE FORECLOSED IN THE DECISION TERMINATING REVIEW.

Gregan asks this Court to rule that, should the State prevail on appeal, Gregan should not be required to repay appellate costs on the grounds that he is currently indigent. This claim should be rejected. It is a defendant's future ability to pay costs, rather than his present ability, that is most relevant in determining whether it would be unconstitutional to require him to pay appellate costs. Because the record contains no information from which this Court

could reasonably conclude that Gregan has no likely future ability to pay, this Court should not forbid the imposition of appellate costs.

As in most cases, Gregan's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As such, the record contains almost no information about Gregan's financial status or employment prospects, and the State did not have the right to obtain information about his financial situation.

Gregan obtained an ex parte Order Authorizing Appeal In Forma Pauperis after presenting a declaration regarding his current financial circumstances. CP 41-42. The declaration contained no information about Gregan's employment history, potential for future employment, or likely future income, nor did the trial court make any findings regarding Gregan's likely future ability to pay financial obligations.

It is a defendant's future ability to pay, rather than simply his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if

the defendant is unable to pay at the time the government seeks to enforce collection of the assessments). The record is devoid of any information that would support a finding that the defendant is unlikely to have any future ability to pay appellate costs.

Gregan is only 29 years old, and received a sentence that involved no additional confinement after sentencing. CP 5, 23. He thus has the vast majority of his working years ahead of him. Because the record in this case contains no evidence from which this Court could reasonably conclude that the defendant has no future ability to pay appellate costs, any exercise of discretion by this Court to prohibit an award of appellate costs in this case would be unreasonable and arbitrary.

Alternatively, this Court could require Gregan to meet the requirements of Division Three's recently published general order, which would provide at least some basis on which to decide Gregan's ability to pay costs. See [http://www.courts.wa.gov/appellate\\_trial\\_courts/?fa=atc.genorders\\_orddisp&ordnumber=021&div=III](http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=021&div=III).

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this court to affirm the order setting restitution and assess appellate costs.

DATED this 8<sup>th</sup> day of August, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Christopher Gibson, the attorney for the appellant, at Gibsonc@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Jacob D Gregan, Cause No. 74437-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 8<sup>th</sup> day of August, 2016.

U Brame

Name:

Done in Seattle, Washington