 74672-3

NO. 74672-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW GONCE,

Appellant.

FILED
June 14, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable John H. Chun, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court exceeded its statutory authority in awarding restitution for lost wages resulting from emotional distress.

Issue Pertaining to Assignments of Error

1. RCW 9.94A.750(3) allows a trial court to award restitution for "lost wages resulting from injury," but prohibits restitution for "mental anguish, pain and suffering, or other intangible losses." Did the trial court exceed its statutory authority in awarding restitution for lost wages resulting from emotional distress?

B. STATEMENT OF THE CASE

Matthew Gonce pled guilty to one count of malicious harassment against Carol Harris and two counts of fourth degree assault, one against Rebekah Strong and the other against Anna Gonce. CP 8-45. In his plea agreement, Gonce explained his consumption of marijuana laced with PCP (phencyclidine) substantially contributed to his behavior. CP 39. The trial court held a hearing on January 28, 2016 to determine the amount of restitution Gonce owed as a result of these offenses.

Strong is a registered nurse at the University of Washington Medical Center. RP 7. On December 4, 2014, she saw Gonce in a patient's room "mumbling under his breath about bitches, and then he saw me and said

something along the lines of 'And here's a bitch right here.'"[1] RP 8. Strong told Gonce not to use that language towards her and continued past him. RP 8-9. As she passed, Gonce "smacked [Strong's] butt extremely hard." RP 9. Strong said this was upsetting, painful, and embarrassing. RP 9. Gonce then began throwing equipment to the ground, yelling obscenities, and threatening to kill "[a]ny person that came into his line of sight." RP 10.

Strong went to see her primary care doctor on December 17, 2014, because she "was feeling extremely anxious" and "was very distracted and jumpy at work." RP 10, 16. Her doctor instructed her to take a week off work as a result of her emotional distress. RP 11, 17-18. Strong explained the only physical contact she had with Gonce was when he slapped her buttocks and this did not physically injure her. RP 12, 17. She agreed she previously suffered from depression. RP 17. She sought treatment solely "because of the emotional impact of the incident." RP 17.

Harris is a patient service specialist with the UW Medical Center. RP 19-20. She testified that on December 4, 2014, Gonce started making a big commotion and swearing at people. RP 22. Gonce made eye contact with Harris and then started using racial slurs towards her and threatened to pull out her braids. RP 23-24. Harris ran away as Gonce came towards her desk, grabbed her computer monitor, and threw it on the ground. RP 24.

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[1] Gonce was at the hospital because his wife was pregnant. RP 23.

Harris testified she hit her shoulder as she was running away from Gonce. RP 24. Gonce, however, never physically touched Harris. RP 31.

Harris testified "something inside me broke" as a result of the incident, making it hard for her to concentrate. RP 25. She sought medical attention for her shoulder and counseling for her emotional distress. RP 25-26. Her shoulder injury was minor and did not restrict her ability to work. RP 38. However, her doctor diagnosed her with adjustment disorder as a result of her emotional response to the incident. RP 38-40. She missed several months of work and saw a counselor for most of 2015. RP 44. Harris agreed she missed work because of emotional, not physical problems, and the "injury" was "in my head" and "my nervous system." RP 25-26.

Strong and Harris filed claims with the Department of Labor and Industries (L&I) for their medical expenses and lost wages. CP 59. Strong received a total of $1,731.78, which consisted of $1,491.60 in lost wages as a result of her emotional distress and $240.18 in medical services for visiting her doctor on December 17. CP 59; RP 49-50. Harris received a total of $8,566.05, which consisted of $5,115.69 in lost wages as a result of her emotional distress and $3,450.36 in medical services, including counseling and visiting her doctor for her shoulder. CP 59; RP 50-51, 57. The State sought restitution for these amounts, totaling $10,297.83. CP 59. Sandra

Chey testified on behalf of the Department of Labor and Industries at the restitution hearing. RP 46-47.

Gonce objected to the entire amount of restitution sought. RP 62-63. Relevant here, Gonce objected to an award of lost wages for both Strong and Harris, because they were lost wages only for emotional distress, not physical injury, which is not permitted by the restitution statute. RP 65-70.

The trial court awarded the total amount of restitution sought for Strong's lost wages and medical expenses. RP 67-68; CP 56. As to the lost wages, the court said only, "I do feel the State has met its burden." RP 68. The court also awarded the total amount of restitution sought for Harris's medical expenses and counseling. RP 88-89. However, the court thought "there is more fuzziness" with respect to Harris's lost wages. RP 88. The court therefore awarded her lost wages only through February 2015, rather than March 2015. RP 89. The court explained it "didn't see why essentially three months wouldn't be a reasonable time" for Harris to recover from the emotional impact of the incident. RP 89.

The trial court entered a written restitution order awarding $1,731.78 for Strong's L&I claim and $7,654.99 for Harris's L&I claim. CP 56. Gonce timely appealed from the restitution order. CP 74.

C. ARGUMENT

1. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN AWARDING RESTITUTION FOR LOST WAGES RESULTING FROM EMOTIONAL DISTRESS.

A trial court's power to impose restitution "derives entirely from the statute." State v. Woods, 90 Wn. App. 904, 906, 953 P.2d 834 (1998). Because restitution is authorized only by statute, "a trial court exceeds its statutory authority in ordering restitution where the loss suffered is not causally related to the offense committed by the defendant, or where the statutory provisions are not followed." State v. Vinyard, 50 Wn. App. 888, 891, 751 P.2d 339 (1988). If a court exceeds its statutory authority when imposing restitution, the restitution order is void and must be vacated. State v. Duback, 77 Wn. App. 330, 332, 891 P.2d 40 (1995); In re Pers. Restraint of Martin, 129 Wn. App. 135, 139, 118 P.3d 387 (2005). Erroneous restitution orders may be challenged for the first time on appeal. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).

Statutory interpretation is a question of law reviewed de novo. State v. Gray, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012). This Court's fundamental objective is to ascertain and carry out the legislature's intent. Id. Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of

the entire statute, related provisions, and the statutory scheme as a whole. Id. at 926-27. If the statute is unambiguous, the court's inquiry ends. Id. at 927. If the statute remains susceptible to more than one reasonable interpretation, it is ambiguous. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010).

The restitution statute specifies, in relevant part:

> [R]estitution 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.

RCW 9.94A.750(3).

At issue is whether "lost wages resulting from injury" includes lost wages resulting from emotional distress. Restitution may be awarded for damages from injury, treatment for injury, and lost wages resulting from injury. RCW 9.94A.750(3). "Injury" is not defined by the Sentencing Reform Act (SRA) of 1981, chapter 9.94A RCW. See RCW 9.94A.030 (definitions). The dictionary definition is very broad: "an act that damages, harms, or hurts : an unjust or undeserved infliction of suffering or harm." WEBSTER'S THIRD NEW INT'L DICTIONARY 1164 (1993). The State may argue this broad definition encompasses lost wages for emotional distress.

But the word "injury" cannot be read in isolation: "All words must be read in the context of the statute in which they appear, not in isolation or subject to all possible meanings found in a dictionary." State v. Lilyblad, 163 Wn.2d 1, 9, 177 P.3d 686 (2008); accord State v. Roggenkamp, 153 Wn.2d 614, 633, 106 P.3d 196 (2005) ("[A] single word in a statute should not be read in isolation, and . . . 'the meaning of words may be indicated or controlled by those with which they are associated.'" (quoting State v. Jackson, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999)).

The statute contrasts "injury," for which an individual may recover, and "mental anguish," for which an individual may not. RCW 9.94A.750(3). "Another fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms." Roggenkamp, 153 Wn.2d at 625; accord Koenig v. City of Des Moines, 158 Wn.2d 173, 182, 142 P.3d 162 (2006) ("When the legislature employs different terms in a statute, we presume a different meaning for each term."). The statutory distinction between "injury" and "mental anguish" demonstrates that, in this context, injury means *physical* injury.

This is also apparent from the statutory authorization of "actual expenses occurred for treatment for injury to persons," as well as "the costs of counseling reasonably related to the offense." The first contemplates treatment for physical injury. The second contemplates treatment for mental

anguish. There is a clear legislative choice to distinguish between the two. To read "lost wages resulting from injury" as including lost wages from emotional distress would essentially write this distinction out of the statute. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) ("'Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)).

The statute is plain: the only form of restitution allowed for mental anguish is "the costs of counseling reasonably related to the offense."[2] RCW 9.94A.750(3). The statute does not permit an award of restitution for lost wages resulting from emotional distress. Lost wages may be awarded only when they result from physical injury. Emotional distress is not a physical injury contemplated by the statute.

At best, the restitution statute is ambiguous as to whether "lost wages resulting from injury" includes emotional distress. "[T]he rule of lenity applies to the SRA and operates to resolve statutory ambiguities, absent legislative intent to the contrary, in favor of a criminal defendant." In re Pers. Restraint of Sietz, 124 Wn.2d 645, 652, 880 P.2d 34 (1994) (citing State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991)); see also United

[2] Indeed, Gonce is not disputing the trial court's award of restitution for Strong's and Harris's counseling expenses as a result of the incident. RP 67-68, 88-89.

States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) ("[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."). The rule of lenity therefore requires the statute to be interpreted in Gonce's favor, limiting an award of lost wages to those resulting from physical injury.

Notably, the statute "does not limit civil remedies . . . available to the victim." RCW 9.94A.750(8). To the extent Strong and Harris suffered emotional distress and missed work as a result, the proper remedy is a tort claim, not restitution. Any argument by the State that the restitution award is necessary to make Strong and Harris "whole" should therefore be rejected.

The trial court awarded $1,491.60 in lost wages for Strong and $4,204.63 in lost wages for Harris. CP 56-58. Both Strong and Harris testified these lost wages resulted solely from their emotional distress after the incident, not because of any physical injury caused by Gonce. RP 17-18 (Strong), 25-26 (Harris). Under the plain language of the restitution statute, the trial court was not authorized to award restitution for Strong's and Harris's lost wages resulting from their emotional distress. This Court should reverse the void restitution order and remand for the trial court to vacate the awards for lost wages. Vinyard, 50 Wn. App. at 894.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

If Gonce does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts "may require an adult . . . to pay appellate costs." (Emphasis added.) The word "may" has a permissive meaning. Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State's request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State's request for appellate costs).

Gonce's ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. The court did, however, enter an order of indigency, finding Gonce "unable by reason of poverty to pay for any of the expenses of appellate review." CP 71. Gonce has no education beyond high school. CP 32. The record otherwise indicates very little about Gonce's abilities and employment opportunities except he was sentenced to 60 days of work release. CP 48.

Furthermore, in determining an individual's ability to pay, courts must consider "important factors" such as the individual's "other debts, including restitution." State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Restitution debt "shall be paid prior to any payments of other monetary obligations." RCW 9.94A.760(1). This Court should therefore

consider the significant restitution debt Gonce owes in this case, and that it must be paid before Gonce could pay any appellate costs. CP 56.

Finally, there has been no order finding Gonce's financial condition has improved or is likely to improve. RAP 15.2(f) specifies "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." This Court must presume Gonce remains indigent and give him the benefits of that indigency. RAP 15.2(f); Sinclair, 192 Wn. App. at 393. For these reasons, this Court should not assess appellate costs against Gonce in the event he does not substantially prevail on appeal.

D. CONCLUSION

For the foregoing reasons, this Court should reverse the restitution order and remand so the award for Strong's and Harris's lost wages can be removed from the final restitution amount.

DATED this 13th day of June, 2016.

Respectfully submitted,

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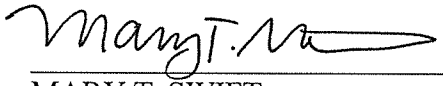

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