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STATE OF WASHINGTON

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Nº. 33741-0-II

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

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STATE OF WASHINGTON  
Respondent,

v.

TODD RYAN DUFFNER,  
Appellant.

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**OPENING BRIEF OF APPELLANT**

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Appeal from the Superior Court of Kitsap County,  
Cause No. 04-1-01315-0  
The Honorable Russell W. Hartman, Presiding Judge

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**TABLE OF CONTENTS**

	<i>Page</i>
<b>A. ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....</b>	<b>1</b>
1. Did the court err in entering an Order extending the date for setting restitution for “good cause” based solely on “stipulation of the parties”?.....	1
2. Did the court err in ordering restitution to insurance companies where there was no reasonable basis for estimating the loss that each company suffered and the court was subjected to speculation or conjecture to arrive at the restitution figure?.....	1
3. Did the court err in ordering restitution in the amount of \$182,152.87 where it failed to consider Mr. Duffner’s ability to pay that amount? .....	1
4. Did Mr. Duffner receive ineffective assistance of counsel where counsel agreed to seven continuances for setting restitution, stipulated to an extension of time beyond 180 days from sentencing, and presented no evidence on Mr. Duffner’s behalf at the restitution hearing? .....	1
<b>C. STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>D. ARGUMENT .....</b>	<b>7</b>
1. The trial court erred in extending the date for setting restitution beyond 180 days based on “stipulation of the parties.” .....	9
2. The trial court erred in setting restitution for medical expenses at \$172,394.04.....	12

3.	The trial court abused its discretion in ordering restitution in the amount of \$182,152.87. ....	21
4.	Mr. Duffner received ineffective assistance of counsel. ....	23
<b>E.</b>	<b>CONCLUSION</b> .....	26

**TABLE OF AUTHORITIES**

Page

**Table of Cases**

**Federal Cases**

*Dows v. Wood*, 211 F.3d 480 (9<sup>th</sup> Cir.)  
*cert. denied*, 121 S.Ct. 254, 531 U.S. 908,  
148 L.Ed.2d 183(2000).....23

**Washington Cases**

*State v. Barnett*, 36 Wn. App. 560, 675 P.2d 626,  
*review denied*, 101 Wn.2d 1011 (1984)..... 12

*State v. Bunner*, 86 Wn. App. 158, 936 P.2d 419 (1997) .....19, 20

*State v. Davison*, 116 Wn.2d 917, 809 P.2d 1374 (1991).....7

*State v. Dedonado*, 99 Wn. App. 251,  
991 P.2d 1216 (2000).....8, 13, 20, 21

*State v. Dennis*, 101 Wn. App. 223, 6 P.3d 1173 (2000).....13, 20, 21

*State v. Edelman*, 97 Wn. App. 161, 984 P.2d 421 (1999),  
*review denied*, 140 Wn.2d 1003, 99 P.2d 1292 (2000).....7

*State v. Ewing*, 102 Wn. App. 349, 7 P.3d 835 (2000) .....12

*State v. Fleming*, 75 Wn. App. 270, 877 P.2d 243 (1994).....8, 9

*State v. Hahn*, 100 Wn. App. 391, 996 P.2d 1125,  
*review granted*, 141 Wn.2d 1025, 11 P.3d 825 (2000).....8, 12, 17, 19

*State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005).....8, 22

*State v. Johnson*, 96 Wn. App. 813, 981 P.2d 25 (1999).....10

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

<i>State v. Kisor</i> , 68 Wn. App. 610, 844 P.2d 1038, <i>review denied</i> , 121 Wn.2d 1023, 831 P.2d 789 (1992).....	20
<i>State v. Martinez</i> , 78 Wn. App. 870, 899 P.2d 1302 (1995), <i>review denied</i> , 128 Wn.2d 1017, 911 P.2d 1342 (1996).....	12
<i>State v. McNeal</i> , 145 Wn.2d 352, 37 P.3d 280 (2002) .....	23
<i>State v. Moen</i> , 129 Wn.2d 535, 919 P.2d 69 (1996) .....	11, 25
<i>State v. Tetreault</i> , 99 Wn. App. 435, 998 P.2d 330, <i>review denied</i> , 141 Wn.2d 1015, 10 P.3d 1072 (2000).....	7, 10, 11, 12

***Other Authorities***

Washington Constitution, Article 1 § 22 .....	23
RCW 9.94A.753.....	9, 21, 25

**A. ASSIGNMENTS OF ERROR**

(1) The trial court erred in extending the date for setting restitution “for good cause based on stipulation of the parties.”

(2) The trial court erred in entering the Order of Restitution in the amount of \$182,152.87.

(3) Mr. Duffner received ineffective assistance of counsel.

**B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

(1) Did the court err in entering an Order extending the date for setting restitution for “good cause” based solely on “stipulation of the parties”? (Assignment of Error No. 1)

(2) Did the court err in ordering restitution to insurance companies where there was no reasonable basis for estimating the loss that each company suffered and the court was subjected to speculation or conjecture to arrive at the restitution figure? (Assignment of Error No. 2)

(3) Did the court err in ordering restitution in the amount of \$182,152.87 where it failed to consider Mr. Duffner’s ability to pay that amount? (Assignment of Error No. 2)

(4) Did Mr. Duffner receive ineffective assistance of counsel where counsel agreed to seven continuances for setting restitution, stipulated to an extension of time beyond 180 days from sentencing, and presented no evidence on Mr. Duffner’s behalf at the restitution hearing? (Assignment of Error No. 3)

**C. STATEMENT OF THE CASE**

While driving when he was heavily intoxicated, Mr. Duffner hit a bicyclist riding on the side of the road, causing him serious physical injuries. 1/18/05 RP 8-12. The bicyclist was Dr. Earnest Franz, an

emergency room physician at Harrison Hospital in Bremerton. 1/18/05  
RP 7-8.

The Court accepted Mr. Duffner's guilty plea (1/18/05 RP 5) and he was sentenced to six months confinement. 1/18/05 RP 19. Following Mr. Duffner's plea, the prosecutor stated "Standard legal financial obligations. We have a sign/set restitution date of March 29, 2005." 1/18/05 RP 6.

On March 29, the "Victim Impact Statement and Restitution Estimate" was filed by the State. CP 43-50. The documentation requesting restitution in the amount of \$236,327.00 for "medical expenses" consisted of a 5-page "summary" and the statement that "Dr. Franz's medical records relating to his August 23, 2004 injuries are extensive and may be produced upon request." CP 43-50.

The State also filed the "Restitution Estimate for Bainbridge Island Fire Department" on March 29, 2005. CP 51-64. The Fire Department's documentation for restitution in the amount of \$1,129.12 included the Medical Incident Report, the Unit Clear Report, and an Invoice. *Id.*

On March 29, 2005, an Order Setting Trial Date and/or Other Hearings was signed by Judge Sally F. Olsen, setting the restitution "sign or set" for April 26, 2005. CP 170.

On April 25, 2005, the State filed a second copy of the “Victim Impact Statement and Restitution Estimate” which was identical to the document filed on March 29<sup>th</sup>. CP 65-72. On April 26, 2005, the State filed a “Restitution Estimate for Safeco Insurance,” which states, in pertinent part:

You asked that we forward a letter detailing our payments on this claim. We paid \$100,000 to the Buskirk Law Offices under the UIM BI coverage. This law office was representing Mr. Franz for his UIM claim. We also paid \$11,600 under the Personal Injury Protection Coverage for medical expenses and wage loss.

CP 73-74.

On April 26, 2005, an Order Setting Trial Date and/or Other Hearings was signed by Judge Sally F. Olsen, setting the restitution “sign or set” for May 17, 2005. CP 172.

On May 2, 2005, the State filed a “Supplemental Restitution Estimate for Ernest Franz.” CP 75-90. Submitted as documentation was a cover letter showing a break-down of Dr. Franz’s out-of-pocket expenses by category, totaling \$7,204.00. The individual bills summarized by category were also submitted.

On May 17, 2005, an Order Setting Trial Date and/or Other Hearings was signed by Judge Jay B. Roof, setting the restitution “sign or set” for June 1, 2005. CP 174.

On May 24, 2005, a “Supplemental Restitution Estimate for Ernest A. Franz” was filed, providing an “updated summary sheet” of Dr. Franz’s out-of-pocket expenses totaling \$8,629.71. CP 91-94. Although the cover letter states that “billing statements and invoices to support these expenses was enclosed,” they were not included with the documentation filed by the State. *Id.*

On June 1, 2005, Judge Roof signed an Order Setting Trial Date and/or Other Hearings setting the restitution “sign or set” for June 14, 2005 (CP 175), continuing the matter because “still investigating insurance pmt & def. ins. may have paid some as well.” CP 95.

On June 14, 2005, an Order Setting Trial Date and/or Other Hearings was signed by Judge Sally F. Olsen, setting the restitution “sign or set” for June 28, 2005. CP 177.

On June 28, 2005, Judge Olsen signed an “Order Extending for Good Cause,” stating “the Court finds good cause to extend the period for setting Restitution based upon the agreement of the parties.” CP 180. On June 28, 2005, an Order setting Trial Date and/or Other Hearings was also signed by Judge Olsen, setting the restitution “sign or set” for July 12, 2005. CP 179.

On July 12, 2005, Judge Roof signed an Order Setting Trial Date and/or Other Hearings, setting the restitution hearing for August 2, 2005. CP 182.

On August 1, 2005, the State filed its “Memorandum of Authorities re: Restitution” (CP 97-154), attaching the same documentation previously submitted for the Bainbridge Island Fire Department supporting restitution in the amount of \$1,129.12, the updated summary of Dr. Franz’s out-of-pocket expenses totaling \$8,629.71, and a one-paragraph letter from Safeco Insurance Company, stating:

This letter will serve to document our phone conversation of this morning. In that conversation I advised you that we paid 500,000 under the underinsured motorist coverage to Mr. Franz. His attorney informed us that Mr. Franz’s medical bills were in excess of \$231,000.00. We had actual documentation of medical bills in the amount of \$195,307.57.

CP 154.

On August 2, 2005, 196 days from the date of sentencing, the trial court held the restitution hearing. 8/2/05 RP 2. The State argued that Bainbridge Island Fire Department should be awarded restitution in the amount of \$1,129.12 (8/2/05 RP 3) and that Dr. Franz should be awarded restitution in the amount of \$8,629.71 (8/2/05 RP 6).

The State characterized “the amount that Safeco has requested” as “[t]he bigger and most difficult issue.” *Id.* The State conceded that

Safeco had never provided a “breakdown” of payments made as a result of the injuries sustained by Dr. Franz (8/2/05 RP 7), and that “there is just no way for the State to be before the Court and ask you to impose” the \$500,000 figure mentioned in Safeco’s August 1 letter (CP 154) to the prosecutor’s office. 8/02/05 RP 9.

The prosecutor stated that he had not received any other documentation from Safeco “other than a letter I submitted which indicates [Safeco’s representative had] seen about \$195,000 in medical expenses total.” 8/2/05 RP 12. The trial court responded, “And my question, they may see that, where do I see it?” *Id.*

On August 5, 2005, 199 days from sentencing, the court ordered that restitution in the amount of \$1,129.12 be paid to the Bainbridge Island Fire Department (8/5/05 RP 2) and restitution in the amount of \$8,629.21 be paid to Dr. Franz. 8/5/05 RP 4. The court also ordered restitution in the amount of \$ \$172,394.04 for “medical expenses.” 8/05/05 RP 6.

The Order of Restitution entered on August 11, 2005 states in part:

[A]lthough it is presently unclear which insurance company ultimately paid the victim’s medical bills, the fact that medical bills in the amount of \$172,394.04 were paid by one of the insurance companies has been established by a preponderance of the evidence. The court will, therefore, order that the defendant pay restitution for these medical expenses in the amount of \$172,394.04 and that any payment the Defendant makes towards that restitution amount shall be kept in the court registry until further order

of the court. Upon a showing by a qualified insurance carrier that it was the insurer provider who actually paid the medical expenses at issue, the Court will order any funds held in the court registry on this matter to be released to the insurance carrier who actually suffered the loss.

CP 163-164.

The total amount of restitution ordered was \$182,152.87. CP 164.

Notice of Appeal from the Order of Restitution was timely filed on August 26, 2005.

**D. ARGUMENT**

“[U]nder the sentencing reform act, restitution is part of an offender’s sentence.” *State v. Edelman*, 97 Wn. App. 161, 166, 984 P.2d 421 (1999), *review denied*, 140 Wn.2d 1003, 99 P.2d 1292 (2000). “A court does not have inherent power to impose restitution; the authority to impose restitution is derived from statute.” *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991).

The sentencing court must determine an offender’s restitution amount at the sentencing hearing or within 180 days of sentencing unless the court extends this period for good cause. *State v. Tetreault*, 99 Wn. App. 435, 436-438, 998 P.2d 330, *review denied*, 141 Wn.2d 1015, 10 P.3d 1072 (2000). If, without a timely finding of good cause, the court holds a restitution hearing and enters a restitution order after the 180-day deadline, an appellate court will vacate the restitution order. *Tetreault*, 99

Wn. App. at 436-437, 998 P.2d 330. An appellate court will also vacate a restitution order if there is no causal connection between the victim's loss and the conduct of the defendant. *State v. Dedonado*, 99 Wn. App. 251, 257-258, 991 P.2d 1216 (2000).

A trial court has "great power and discretion in issuing restitution." *State v. Hughes*, 154 Wn.2d 118, 153, 110 P.3d 192 (2005). This court reviews a restitution order under the abuse of discretion standard. *State v. Hahn*, 100 Wn. App. 391, 398, 996 P.2d 1125, *review granted*, 141 Wn.2d 1025, 11 P.3d 825 (2000). "A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or imposed for untenable reasons." *Id.* "An erroneous restitution order cannot be deemed harmless error merely because the amount of restitution ordered was less than could have been imposed by the trial court." *State v. Fleming*, 75 Wn. App. 270, 274-275, 877 P.2d 243 (1994).

Restitution must be "based on easily ascertainable damages" (*Hughes*, 154 Wn.2d at 154, 110 P.3d 192; RCW 9.94A.753(3)), and "[t]he amount of damages claimed must be supported by substantial credible evidence." *Fleming*, 75 Wn. App. at 275, 877 P.2d 243, citing *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51, *review denied*, 120 Wn.2d 1015, 844 P.2d 436 (1992).

Although the amount of harm or loss “need not be established with specific accuracy” (*Fleming*, 75 Wn. App. at 274, 877 P.2d 243), the State must present evidence sufficient to provide a “reasonable basis for estimating loss” and which “does not subject the trier of fact to mere speculation or conjecture.” *Fleming*, 75 Wn. App. at 274-275, 877 P.2d 243.

In setting restitution, the “court should take into consideration the total amount of the restitution owed, the offender’s present, past, and future ability to pay, as well as any assets that the offender may have.” RCW 9.94A.753(1).

***1. The trial court erred in extending the date for setting restitution beyond 180 days based on “stipulation of the parties.”***

RCW 9.94A.753(1) provides that a trial court “shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days . . . .The court may continue the hearing beyond the one hundred eighty days for good cause.”

Mr. Duffner’s restitution was not determined until 199 days after sentencing (January 18 – August 5). An order was entered on June 28 that states: “[T]he Court finds good cause to extend the period for setting Restitution based upon the agreement of parties.” CP 180.

There is no motion for an extension of time in the record; there is no stipulation to extend the time for setting restitution signed by defense counsel and/or Mr. Duffner in the record; and there is no waiver of the 180-day deadline signed by Mr. Duffner in the record.

The 180-day deadline for setting restitution is mandatory, subject only to the exception that a continuance may be granted if good cause is shown. *State v. Johnson*, 96 Wn. App. 813, 816, 981 P.2d 25 (1999), citing *State v. Krall*, 125 Wn.2d 146, 881 P.2d 1040 (1994).

“Good cause” has been construed to require “a showing of some external impediment that did not result from a self-created hardship that would prevent a party from complying with statutory requirements.” *Johnson*, 96 Wn. App. at 817, 981 P.2d 25. “Inadvertence or attorney oversight is not ‘good cause.’” *Id.*, citing *State v. Tomal*, 133 Wn.2d 985, 989, 948 P.2d 833 (1997).

Extending the deadline for imposition of restitution without a timely finding of good cause “infringes upon a defendant’s rights to speedy sentencing set forth under court rules and the sentencing reform act of 1981.” *Tetreault*, 99 Wn. App. at 438, 998 P.2d 330, citing *State v. Ellis*, 76 Wn. App. 391, 394-395, 884 P.2d 1360 (1994).

A motion to extend the 180-day deadline for “good cause” may be filed within that time period. No such motion was filed in this case. The purpose for requiring a motion is set out in *Tetreault*:

The timely submission of a request for extending the 180-day period would allow the court to consider the State’s diligence in procuring the necessary evidence as well as other factors that the State has conceded are applicable to a request for a continuance of sentencing such as (1) the length of the delay, (2) the reason for delay, (3) the defendant’s assertion of his or her right to speedy sentencing, and (4) the extent of prejudice to the defendant.

*Tetreault*, 99 Wn. App. at 332, 998 P.2d 330.

RCW 9.94A.753(1) provides that the 180-day deadline may be extended for “good cause.” The statute does **not** provide that the 180-day deadline may be extended by “agreement of the parties,” nor does an agreement of the parties necessarily constitute “good cause” to extend the deadline for speedy sentencing/restitution. A trial court does not have inherent authority to order restitution; rather, its authority is statutory. *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996). The trial court in this case went outside its statutory authority to order an extension of the 180-day deadline based on “agreement of the parties.”

This Court should vacate the Restitution Order because it was entered more than 180 days after Mr. Duffner was sentenced, there was no timely motion for continuance of the restitution hearing, and an

“agreement of the parties” does not equate to a finding of “good cause.”  
*See Tetreault*, 99 Wn. App. at 332, 998 P.2d 330 (vacating restitution order where request to extend the 180-day period was untimely); *Johnson*, 96 Wn. App. at 818, 981 P.2d 25 (vacating restitution order where court ordered a restitution hearing beyond the 180-day limit).

**2. *The trial court erred in setting restitution for medical expenses at \$172,394.04.***

The SRA impliedly limits restitution to “victims.” *State v. Martinez*, 78 Wn. App. 870, 882, 899 P.2d 1302 (1995), *review denied*, 128 Wn.2d 1017, 911 P.2d 1342 (1996). “[F]unds expended by a victim as a direct result of the crime (whether or not the victim is an ‘immediate’ victim of the offense) can be a loss of property on which restitution is based.” *State v. Kinneman*, 155 Wn.2d 272, 287, 119 P.3d 350 (2005). A “victim” is defined as “any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.” *State v. Ewing*, 102 Wn. App. 349, 352, 7 P.3d 835 (2000), quoting RCW 9.94A.030(40). An insurance company can be a “victim” for purposes of restitution. *State v. Barnett*, 36 Wn. App. 560, 562, 675 P.2d 626, *review denied*, 101 Wn.2d 1011 (1984).

There must be a causal relationship between the victims’ medical expenses and the crime committed. *Hahn*, 100 Wn. App. at 399, 996 P.2d

1125. If the State fails to establish a causal connection between the defendant's actions and the damages, an appellate court must vacate the restitution order. *State v. Dennis*, 101 Wn. App. 223, 229, 6 P.3d 1173 (2000), citing *State v. Dedonado*, 99 Wn. App. 251, 991 P.2d 1216, 1219 (“In determining any sentence, including restitution, the sentencing court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged or proved in a trial or at the time of sentencing.”) “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.” *Dennis*, 101 Wn. App. at 229, 6 P.3d 1173, citing *State v. McCorkle*, 137 Wn.2d 490, 496, 973 P.2d 461 (1991) (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)<sup>1</sup>.

In this case, the State presented no evidence whatsoever from Premera Blue Cross insurance company. The trial court acknowledged

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<sup>1</sup> This Court cited *Dedonado* as authority for remanding a restitution order “for the taking of additional evidence to determine the causal connection between the DSHS expenditures and charged crimes.” *Hahn*, 100 Wn. App. at 400, 996 P.2d 1125. However, the *Dedonado* Court did **not** remand the restitution order “for the taking of additional evidence.” Remand was for the purpose of fixing “the proper amount of restitution” after “those portions of the restitution order which the State did not prove within the 180-day period” were vacated. *Dedonado*, 99 Wn. App. at 257-258, 991 P.2d 1216.

that Premera had submitted nothing: “Premiera [sic.] has not directly applied for restitution . . . .” 8/5/05 RP 7.

The State presented one letter from Safeco Insurance Company dated April 14, 2005, in which the following language is found: “We paid \$100,000 to the Buskirk Law Offices under the UIM BI coverage. . . . We also paid \$11,600 under the Personal Injury Protection Coverage for medical expenses and wage loss.” CP 74.

The State also presented a second letter from Safeco dated August 1, 2005, in which is stated that Safeco had “paid 500,000 under the underinsured motorist coverage to Mr. Franz. His attorney informed us that Mr. Franz’s medical bills were in excess of \$231,000.00. We had actual documentation of medical bills in the amount of \$195,307.57.” CP 154.

After receiving the State’s evidence, the trial court found that it needed “to look a little bit more carefully at the documentation attached to the restitution claims.” 8/2/05 RP 18. In other words, the restitution ultimately ordered by the trial court was not “based on easily ascertainable damages” as required by *Hughes* and RCW 9.94A.753(3).

Three days later, the court made its oral ruling. After finding that Dr. Franz and the Bainbridge Island Fire Department had supplied

sufficient documentation to support an award of restitution, the court stated:

Now, there is a third applicant here and that's Safeco Insurance Company. It's clear that when insurance companies pay losses which are otherwise compensable under 9.94A.753(3) that restitution may be provided for. Safeco's application consists of two short letters, one that's dated April the 14th of '05 indicating they paid uninsured motorist coverage of \$100,000 and personal injury protection coverage of \$11,600. Then on August the 1st, the day before the restitution hearing, they said 'no, we actually paid in a letter dated August the 1<sup>st</sup> uninsured motorist of \$500,000' and they suggested that this included covering Mr. France's [sic.] medical bills in excess of \$231,000 by his documentation. They said their files showed \$195,307 in medical bills paid; however, there are some problems with the documentation for this that I want to talk about.

The only real documentation in the file about medical bills is in Doctor France's [sic.] own April 25, 2005 application. I went back through the information that was attached there rather carefully and this is what that information shows us. It shows an application or shows a record about expenses paid to four different places; the UW physicians, Northwest Lodge, which is a convalescent center care facility; and Harborview Hospital. The last part of the application identifies itself as miscellaneous and includes the ambulance fees and some other things. When I look at those records what they show me is that Primera Blue Cross paid the UW physicians \$12,417.42; Northwoods Lodge \$10,726.51; Harborview was paid by Primera \$141,380.95, and expenses that Primera paid were \$1,204.16 for a total of \$165,729.04. The only expense that Safeco shows having paid directly, probably through reimbursement of Primera on these spreadsheets which itemize the medical expenses, was the airlift on the date of the accident to Harborview in the amount of \$6,665. When you add that to the other information what we have is

documentation which is not controverted and which appears to the court by a preponderance of the evidence to be accurate that \$172,394.04 in medical expenses were paid.

The problem with Safeco's application is twofold: the UIM payments, uninsured motorist payments, include general as well as special damages. Generals are not commenceable [sic.] The medical expenses are a type of special damages which would be compensable under the restitution statute but the information that Safeco provides doesn't explain to us what they have paid in the medical expenses, and the other information shows so far only direct payment of the helicopter medivac. Primera [sic.] has not directly applied for restitution; however, I don't believe that necessarily disqualifies an award of restitution and I will address that in a moment.

It's likely, the court believes although I don't have a record here, that when the UIM was paid to doctor France's [sic.] attorney that some portion of that was paid over to Primera under a subrogation claim but there is nothing in the record that tells me if there was such a payment and if there was such a payment how much it was. And based on my general knowledge of personal injury claims it's possible that Doctor France [sic.] and his counsel negotiated with Primera to reduce the amount of its reimbursement claim using the argument that the total damage sustained is more than what they can recover.

All of that notwithstanding, as I sat down to try and resolve what the records showed me I went back to looking at the general law on restitution. What that tells me is that it's part of the sentence, it's limited to the losses identified in the statute which include "expenses incurred for treatment of an injury. If those expenses are paid by an insurance company they are compensable and the state has the burden of proving restitution by a preponderance of the evidence". I think the state has met those standards with respect to the medical expenses that I have identified and that's the \$172,000 figure.

What the record does not show us is as between Primera and Safeco who's entitled to restitution. But I don't think that that has to be resolved for the state to prevail. What the state has to do is show me that these expenses were paid, and the record demonstrates that. So I will set the reimbursement for medical expenses at \$172,394.04 and it may be that if any of this is ultimately recovered that there will need to be a dispute resolution process between Safeco and Primera to establish who is entitled to receive the funds.

8/5/05 RP 4-8.

The trial court erred in awarding restitution “with respect to the medical expenses” paid by Safeco and Primera because the restitution was not based on “easily ascertainable damages” and the evidence submitted by the State fails to “link[ ] the charged amounts to any particular symptoms or treatments.” *Hahn*, 100 Wn. App. at 399-400, 996 P.2d 1125.

Because there was no evidence whatsoever submitted by Primera, and because Safeco had submitted only letters stating that \$100,000 or \$500,000 had been paid, the Court turned to Dr. Franz’s “Victim Impact Statement and Restitution Estimate” filed on April 25, 2005 (CP 65-72) to calculate a restitution award for the insurance companies.

That document includes a brief “Statement” that Dr. Franz was injured as a result of “the August 23, 2004 incident,” that his injuries include “8 fractured ribs, liver laceration, 2 spine fractures, right leg

fracture, compound and open fractures to his upper arms and nerve damage.” CP 65.

The second page of the form indicates that “Dr. Franz’s medical expenses currently exceed \$236,327.00,” and the reader is directed to “see the attached summary of his medical expenses to date.” CP 66. In answer to the question, “If you are missing or have no copies of bills and/or receipts, please explain why,” the following language is found: “Dr. Franz’s medical records relating to his August 23, 2004 injuries are extensive and may be produced upon request.” *Id.*

The “summary of . . . medical expenses” consists of four pages, the first two of which lists (1) “UW Physicians,” then includes subheadings “Date of Service”; “Service,” i.e. “inpatient,” “freestand,” “facility,” “surgery,” “inpatient, facility,” “hospital,” “treatment,” or “visit”; “Total Bill”; “Paid by Premera”; “1<sup>st</sup> EOB Received”; “Client Respons”; “Addtl EOB”; and “Pmt Due.” CP 67-68. The third page of the “summary” is titled “Northwoods Lodge” and includes the same subheadings as under “UW Physicians.” CP 69. The fourth page is listed “Harborview,” and includes the same subheadings as under “UW Physicians.” CP 70. The fifth page is listed “Misc Medical Providers,” and also includes the same subheadings as under “UW Physicians” and “Harborview.” CP 71.

There is no identification on the summary sheets of what medical procedure was performed during each identified “service,” and no information about why each “service” was provided. This is very similar to the “summary” submitted by DSHS’s Office of Provider Services in *State v. Bunner*, 86 Wn. App. 158, 160, 936 P.2d 419 (1997), which did “not indicate why medical services were provided,” and which, as the State conceded in *Bunner*, “fails to establish the required causal connection between the victim’s medical expenses and the crime committed.” *Id.*

In *Hahn*, this Court wrote:

Although the record here contains evidence of the victims’ substantial injuries, as in *Bunner*, there is no statement linking the charged amounts to any particular symptoms or treatments. Regarding Warner, the medical reports merely state the name of the service provider, the service date, date paid, billed amount and amount paid. . . .

Regarding Mohler, again the record merely identifies numerous medical services rendered either on the date of the crime or shortly thereafter. This circumstantial evidence, alone, is insufficient to allow the sentencing court to estimate losses by a preponderance of the evidence without speculation or conjecture.

*Hahn*, 100 Wn. App. at 400, 996 P.2d 1125.

In this case, the State appended the medical expense summaries to the Statement of Dr. Franz, in which his specific injuries are identified “as a result of the August 23, 2004 incident.” However, even if, as suggested

in *Hahn*, this Court “infer[red] a connection from the fact that nearly all of the individually listed services were provided” (*Id.*) subsequent to the “incident,” there is no description of what each service consisted of and thus no way to know whether it related to the “incident.” “A causal connection is not established simply because a victim or insurer submits proof of expenditures . . .” *Dedonado*, 99 Wn. App. at 257, 991 P.2d 1216. A summary of medical expenses that does not indicate what medical procedures were performed or why the medical services were provided fails to establish the required causal connection between the victim’s medical expenses and the crime committed. *See Dennis*, 101 Wn. App. at 227, 6 P.3d 1173, citing *Dedonado, supra; Bunner*, 86 Wn. App. at 160, 936 P.2d 419.

The trial court here engaged in speculation and conjecture to calculate the amount of restitution for medical expenses paid by Safeco and Premera, which under Washington law is not permitted. *State v. Kisor*, 68 Wn. App. 610, 620, 844 P.2d 1038, *review denied*, 121 Wn.2d 1023, 854 P.2d 1084 (1993), quoting *State v. Fambrough*, 66 Wn. App. 223, 225, 831 P.2d 789 (1992) (restitution must be establish by “substantial credible evidence” which does not “subject the trier of fact to mere speculation or conjecture”).

Because the State failed to establish a causal connection between the medical expense summaries attached to Dr. Franz’s “Victim Impact Statement and Restitution Estimate” and the actions of Mr. Duffner, this Court must vacate that portion of the Order of Restitution for medical expenses paid by Safeco and/or Premera. *Dennis*, 101 Wn. App. at 229, 6 P.3d 1173 (. . . “if the State fails to establish a causal connection between defendant’s actions and the damages, this court must vacate the restitution order.”); *Dedonado*, 99 Wn. App. at 257-258, 991 P.2d 1216 (granting Defendant’s request that the court vacate those portions of the restitution order which the State did not prove within the 180-day period).

**3. *The trial court abused its discretion in ordering restitution in the amount of \$182,152.87.***

RCW 9.94A.753(1) provides that “[t]he court should take into consideration the total amount of the restitution owed, the offender’s present, past, and future ability to pay, as well as any assets that the offender may have” in setting restitution. The trial court utterly failed to consider any of the factors related to Mr. Duffner’s ability to pay or any asset that Mr. Duffner may have had: the only thing considered by the trial court was the State’s evidence.

There is thus very little information in the record about Mr. Duffner’s ability to pay the substantial amount of \$182,152.87 in

restitution. However, it can be gleaned from the record that Mr. Duffner was 19 years old when the restitution was ordered (CP 1); that he lives with his mother and has a part-time job (CP 96); that there was no information available about his monthly income (*Id.*); and that the Kitsap County Superior Court Collection Clerk recommended that Mr. Duffner pay the sum of \$50.00 per month based on no information. *Id.*

Further, the court failed to consider whether Mr. Duffner had insurance (an “asset”) that would pay part of Dr. Franz’s medical expenses. *See* CP 95 (“Still investigating Insurance pmt. & def.ins. may have paid some as well.”).

The trial court failed to consider Mr. Duffner’s past, present, or future ability to pay over \$180,000 in restitution, and failed to consider whether Mr. Duffner had insurance that would pay some of the medical expenses. The court thus abused its discretion in entering the Order of Restitution. *See Hughes*, 154 Wn.2d at 154, 110 P.3d 192 (abuse of discretion in entering a restitution exists “when the trial court’s determination is manifestly unreasonable or based on untenable grounds.”)

The court’s Order of Restitution was based on untenable grounds because it was based solely on the State’s evidence on the victims’ losses, and the factors set out in RCW 9.94A.753(1) were not considered. Where

the trial court abused its discretion in entering a restitution order, the remedy is reversal. *Hughes*, 154 Wn.2d at 154, 110 P.3d 192.

**4. Mr. Duffner received ineffective assistance of counsel.**

Article 1, § 22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9<sup>th</sup> Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, citing *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”). To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), citing *State v. Rosborough*, 62 Wash.App. 341, 348, 814 P.2d 679, *review denied*, 118 Wn.2d 1003, 822 P.2d 287 (1991).

To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280, citing *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish prejudice, a defendant must show that but for

counsel's performance, the result would have been different. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280, citing *State v. Early*, 70 Wash.App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994).

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280, citing *Strickland*, 466 U.S. at 689. If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280, citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

In this case, Mr. Duffner had a right to have restitution set within 180 days of sentencing. Yet, his counsel stipulated<sup>2</sup> to extend that deadline, apparently to accommodate the State's need for more time to amass evidence to support the Order of Restitution. *See* 8/2/05 RP 16 ("Basically we've put this over quite a bit trying to get more information from Safeco.") In effect, Mr. Duffner's counsel gave up his statutory right to have restitution set within 180 days to allow the State more time to

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<sup>2</sup> There is no stipulation signed by Mr. Duffner in the record.

build its case for a higher amount of restitution. This cannot be characterized as legitimate trial strategy.

The defense counsel also failed to present any evidence regarding Mr. Duffner's ability to pay restitution or evidence of insurance available to Mr. Duffner to pay for Dr. Franz's loss, which insurance would have constituted an "asset" of Mr. Duffner's to be considered by the court under RCW 9.94A.753(1). *See* 8/2/05 RP 2 (when asked if she wished to present any evidence, defense counsel responded, "No, your Honor. I think we are just going to proceed with argument."). Similarly, a complete failure to present evidence on behalf of Mr. Duffner to mitigate restitution cannot be characterized as legitimate trial strategy.

The State may argue that because Mr. Duffner agreed to pay restitution (CP 23), any delay in setting the amount he had to pay was harmless. However, "stated willingness to pay restitution [does] not make any difference" where a restitution order is entered beyond the 180-day limit because the court is **required** to impose restitution whenever an offender is convicted of an offense which results in injury to any person. *Moen*, 129 Wn.2d at 540, 919 P.2d 69; RCW 9.94A.140. Further, the Supreme Court has held that "the statutory time mandate prevails over victims' rights to restitution." *Moen*, 129 Wn.2d at 542, 919 P.2d 69.

By agreeing to pay restitution, Mr. Duffner did not waive his right to have the amount set within 180 days of his sentencing. Defense counsel providing reasonably effective assistance to Mr. Duffner would have insured that this right was protected by not agreeing to extend the statutory deadline, particularly here, where the longer the setting of restitution was postponed to enable the State to gather evidence, the more money Mr. Duffner would be required to pay.

Because Mr. Duffner received ineffective assistance of counsel during the post-trial period when restitution was determined, this Court should vacate the Order of Restitution.

**E. CONCLUSION**

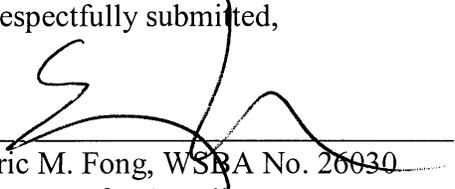
The Court should vacate the Order of Restitution which was entered 199 days after Mr. Duffner's sentencing (1) because the Court entered an order extending the statutory deadline based on the stipulation of the parties instead of on a finding of good cause as required by RCW 9.94A.753(1); (2) because no causal connection could be made between the medical expense summary submitted by the State to establish the loss of Safeco and Premera insurance companies and Mr. Duffner's conduct; (3) the trial court abused its discretion by failing to consider Mr. Duffner's ability to pay the substantial amount of restitution ordered or to consider Mr. Duffner's own insurance (an "asset") when determining the amount of

restitution; and (4) Mr. Duffner received ineffective assistance of counsel during the post-trial period when restitution was determined.

Alternatively, the Court should vacate the Order of Restitution as to the amount awarded to “a qualified insurance carrier” and remand for entry of an Order of Restitution awarding restitution only in the amounts of \$1,129.12 to Bainbridge Island Fire Department and \$8,629.71 to Dr. Franz.

DATED this 6 day of March 2006.

Respectfully submitted,



Eric M. Fong, WSBA No. 26030  
Attorney for Appellant

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON	)	
	)	Appeal No. 33741-0-II
Respondent,	)	Superior Court No. 04-1-01315-0
	)	
vs.	)	
	)	<b>AFFIDAVIT OF MAILING</b>
TODD RYAN DUFFNER	)	
	)	
Appellant.	)	
_____	)	

The undersigned, being first duly sworn, under oath, states: That on the 6<sup>th</sup> day of March 2006, affiant deposited in the United States mails, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
950 Broadway Street, Suite 300  
Tacoma, WA 98402

the original and one copy of the Brief of Appellant, and to

Mr. Randall Sutton  
Attorney at Law  
614 Division Street, MS-35  
Port Orchard, WA 98366

Mr. Todd Duffner  
12291 N. Madison Avenue  
Bainbridge Island, WA 98110

a true copy of the Brief of Appellant.

*Ann Blankenship*  
ANN BLANKENSHIP

SUBSCRIBED AND SWORN to before me this 6<sup>th</sup> day of March 2006.

*Meredith Nora Cepilia*  
MEREDITH NORA CEPILIA  
NOTARY PUBLIC in and for the State of  
Washington, residing at Port Orchard.  
My commission expires 9-11-06.