

FILED
JUN 20 2006
COURT OF APPEALS
JUN 20 2006
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NO. 33741-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

TODD DUFFNER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-01315-0

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED June 20, 2006, Port Orchard, WA *Eric Fong*
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in entering an order extending the date for setting restitution when the order was entered based upon the agreement of the parties?

2. Whether the trial court abused its discretion in ordering restitution for the victim's medical expenses when the medical expenses were supported by documentation and by Dr. Franz's sworn victim impact statement which established that the medical expenses were causally connected to the crime?

3. Whether the trial court did erred in failing to consider the Defendant's ability to pay prior to determining the proper amount of restitution, when ability to pay is relevant only to the monthly minimum payment amount, and is not relevant to the total amount of restitution?

4. Whether the Defendant has failed to overcome the strong presumption that counsel's representation was effective when he has not shown that counsel's representation fell below an objective standard of reasonableness and has not shown that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant was charged by information filed in Kitsap County Superior Court with Vehicular Assault. CP 1. The Defendant entered a guilty plea on January 18, 2005. CP 22. The court imposed a standard range sentence. CP 34. A restitution order was not entered at the time of sentencing, and on June 28, 2005, the court entered an Order Extending for Good Cause based upon the agreement of the parties, and that Order extended the 180-day deadline and stated the last day for setting restitution would be August 16, 2005. CP 182. A restitution hearing was held on August 2, 2005, and the court gave its oral ruling on restitution on August 5, 2005. CP 155, 162. A written restitution order was entered on August 11, 2005. CP 163. This appeal followed.

B. FACTS

On August 23, 2004, Dr. Ernest A. Franz was riding a bicycle on the shoulder of a road when he was struck from behind by a vehicle driven by the Defendant. CP 3-4, CP 65. Witnesses described that the Defendant was “weaving badly” in the lane of travel, veered into the oncoming lane, and crossed the centerline and fogline several times. CP 4.

A witness who was driving ahead of the Defendant noticed the victim riding his bicycle and feared that the Defendant might hit the victim, and so

he honked his horn as he passed the victim, hoping it might draw the cyclist's attention to the swerving vehicle behind him. CP 4. The witness then watched in his rear view mirror as the brown dodge driven by the Defendant swerved over the fog line and struck the victim, sending the victim flying over the top of the car and into a ditch. CP 4.

The Defendant continued driving up the road for a distance of approximately 400 feet, dragging the bicycle underneath the front of his car. CP 4. The Defendant then walked back to the location of the downed victim, stood by for a minute, and then left walking back towards his car. CP 5.

When an officer from the Bainbridge Island Police Department arrived, he observed that the victim was obviously injured with visible injuries to his head, face and chest, and was informed by aid crew that the victim had two broken arms and a closed head injury. CP 4. The victim was airlifted to Harborview Hospital in Seattle. CP 5. An open twelve-pack of beer was found in the Defendant's vehicle, and two vials of blood were later drawn from the Defendant after an arresting officer had noticed a strong odor of intoxicants coming from the Defendant. CP 27, 98. Subsequent testing showed the Defendant's blood alcohol level was ".19." CP 98. The Defendant admitted in his Statement of Defendant on Plea of Guilty that he was under the influence of alcohol at the time. CP 27.

After the sentencing, a number of restitution status hearings were set and later continued. CP 95, 169, 170, 171, 172, 173, 174, 175, 176, 177.

On June 28, 2005, the court signed an Order Extending for Good Cause, in which the court stated that,

“[T]he court finds good cause to extend the period for setting restitution based upon agreement of parties. The last day for setting restitution is August 16, 2005.”

CP 180. This order was signed “Copy Received and Approved” by counsel for the Defendant. CP 180. As the court stated in the order, this Order was entered on agreement from the parties, and there was no objection made below.

The State submitted a letter from Safeco insurance that indicated that it had paid \$500,000 under the underinsured motorist coverage to Dr. Franz, and that it had documentation of medical bills in the amount of \$195,307.57. CP 154.

Dr. Ernest A. Franz, submitted a victim impact statement, signed under the penalty of perjury, in which Dr. Franz outlined that as a result of the August 23 incident, he sustained 8 fractured ribs, a liver laceration, 2 spine fractures, a right leg fracture, compound and open fractures to his upper arms, and nerve damage. CP 65. Dr. Franz requires constant supervision, cannot dress himself or get out of bed on his own, and needs assistance in

going to the toilet. CP 65. In addition, Dr. Franz previously worked as an ER physician, but has been unable to work since the accident due to his injuries. CP 65.

Dr. Franz's victim impact statement also stated that as a result of the incident, his medical expenses exceeded \$236,327, and that he will continue to incur future medical expenses from his injuries. CP 66. Dr. Franz also attached a summary of his medical expenses. CP 67-71. These summaries contained the billing and payment information from four entities: UW Physicians, Northwest Lodge, Harborview Hospital, and "Misc. Medical Providers." CP 67-71.

The trial court went through the information regarding the medical expenses, and stated,

I went back through the information that was attached there rather carefully and this is what the 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 miscellaneous 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.

RP (8/06/05) 5-6. The trial court noted that the Safeco's uninsured motorist payments likely included general as well as special damages, some of which would not be payable under the restitution statute.

RP (8/06/05) 6-7. The court then went on to note,

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.

RP (8/06/05) 7-8. On August 11, 2005, an Order of Restitution was entered. The Order stated,

Furthermore, although 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.

It is Further

ORDERED that the Defendant, TODD RYAN DUFFNER, shall make restitution in the amount indicated below to the Kitsap County Clerk, in full on a payment schedule set forth in the Judgment and Sentence filed in this cause, and said Clerk upon receipt shall disburse any sums now in its hands or hereafter received to the parties in the order as they appear below.

Amount	Name	Address
\$8,629.71	Ernest Andrew Franz	1253 Hawley Way, Bainbridge Island, WA 98110
\$1,129.12	Bainbridge Island Fire Dept. #C-04-1590	8895 Madison Ave, Bainbridge Island, WA 98110
\$172,394.04	Pay to the Court Registry, until the court makes a determination concerning who is entitled to the funds	614 Division Street, Port Orchard, WA 98366

\$182,152.87 Total

CP 163. The payment schedule set forth in the Judgment and Sentence required the Defendant to make payments of \$100 a month. CP 39. This appeal followed.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN ENTERING AN ORDER EXTENDING THE DATE FOR SETTING RESTITUTION BECAUSE ORDER WAS BASED UPON THE AGREEMENT OF THE PARTIES.

The Defendant argues that the trial court erred in entering an order extending the date for setting restitution for “good cause” based solely on “stipulation of the parties.” This claim is without merit because the trial court extended the 180 deadline based upon the agreement of the Defendant, and the Defendant failed to object to the extension, and any potential error in this regard was invited by the Defendant.

RCW 9.94A.753(1) provides that the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days, but “the court may continue the hearing beyond the one hundred eighty days for good cause.” In the present case, the court extended the 180 period for “good cause,” based on the agreement of the parties, and extended the deadline to August 16, 2005. CP 180. The Defendant, however, now argues, without citation to an authority, that agreement of the parties “does

not necessarily constitute 'good cause' to extend the deadline." App.'s Br. at 11.

The general rule is that issues may not be raised for the first time on appeal. RAP 2.5. Further, the purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error. *See, for example, State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979). Furthermore, the doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *In re Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000), citing *In re Breedlove*, 138 Wn.2d 298, 312, 979 P.2d 417 (1999).

By agreeing to the extension, the Defendant waived the 180-day requirement and waived any objection to the restitution order being entered outside the 180-day limit (but prior to August 16, 2005). Furthermore, any claimed error that might have occurred in this regard was invited error, as the trial court obviously relied, at least in part, on the Defendant's agreement to these terms in entering the Order Extending for Good Cause. The Defendant's argument, therefore, must fail.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING RESTITUTION FOR THE VICTIM'S MEDICAL EXPENSES BECAUSE THE MEDICAL EXPENSES WERE SUPPORTED BY DOCUMENTATION AND BY DR. FRANZ'S SWORN VICTIM IMPACT STATEMENT WHICH ESTABLISHED THAT THE MEDICAL EXPENSES WERE CAUSALLY CONNECTED TO THE CRIME.

The Defendant next claims that the trial court abused its discretion in ordering restitution claiming there was not reasonable basis for estimating loss that the insurance companies suffered. This claim is without merit because the record contained substantial credible evidence concerning the loss, and Dr. Franz's sworn victim impact statement established that the medical expenses were causally connected to the crime.

A trial court has discretion to determine the amount of restitution. *State v. Tobin*, 132 Wn. App. 161, 173, 130 P.3d 426 (2006), citing *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51 (1992)(citing *State v. Mark*, 36 Wn. App. 428, 433, 675 P.2d 1250 (1984)). A reviewing court will find an abuse of discretion only if the decision is " 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' " *Tobin*, 132 Wn. App. at 173, citing *Pollard*, 66 Wn. App. at 785, 834 P.2d 51 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). For example, if the amount of damages is shown by " 'substantial credible evidence,' " the trial court did not abuse its discretion. *Tobin*, 132 Wn. App.

at 173, *citing Pollard*, 66 Wn. App. at 785, 834 P.2d 51 (*quoting Mark*, 36 Wn. App. at 434, 675 P.2d 1250). In short, the restitution statute allows the trial court considerable discretion in determining restitution, " which ranges from none (in some extraordinary circumstances) up to double the offender's gain or the victim's loss." *Tobin*, 132 Wn. App. at 174, *citing State v. Kinneman*, 155 Wn.2d 272, 282, 119 P.3d 350 (2005). Finally, the State need prove damages only by a preponderance of the evidence. *Tobin*, 132 Wn. App. at 174, *citing Kinneman*, 155 Wn.2d at 285, 119 P.3d 350.

Under RCW 9.94A.753(3), restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, and actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. *See, for example, Tobin*, 132 Wn. App. at 173. Easily ascertainable damages are tangible damages supported by sufficient evidence. *Tobin*, 132 Wn. App. at 173, *citing State v. Bush*, 34 Wn. App. 121, 123, 659 P.2d 1127 (1983). But "[c]ertainty of damages need not be proven with specific accuracy." *Tobin*, 132 Wn. App. at 173, *citing Pollard*, 66 Wn. App. at 785. Instead, Washington courts have held that " '[o]nce the fact of damage is established, the precise amount need not be shown with mathematical certainty.' " *Tobin*, 132 Wn. App. at 173, *citing Bush*, 34 Wn. App. at 123, 659 P.2d 1127, *see also Pollard*, 66 Wn. App. at 785, 834 P.2d 51; *Mark*, 36 Wn. App. at 434, 675 P.2d 1250.

Furthermore, RCW 9.94A.753(5) provides that 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.

Restitution is proper when a causal connection exists between the crime and the injuries for which compensation is sought. *Tobin*, 132 Wn. App. at 179, citing *State v. Vinyard*, 50 Wn. App. 888, 894, 751 P.2d 339 (1988). In deciding whether a restitution order is within a trial court's statutory authority, a reviewing court uses a "but for" factual test to evaluate the causal link between the criminal acts and a victim's damages. *Tobin*, 132 Wn. App. at 179, citing *State v. Hunotte*, 69 Wn. App. 670, 676, 851 P.2d 694 (1993) (citing *State v. Blair*, 56 Wn. App. 209, 215, 783 P.2d 102 (1989)); *State v. Harrington*, 56 Wn. App. 176, 180, 782 P.2d 1101 (1989); *State v. Barrett*, 54 Wn. App. 178, 179, 773 P.2d 420 (1989).

Furthermore, the legislature has expressed "a strong desire that offenders must pay restitution to the victims of their crimes." *Tobin*, 132 Wn. App. at 175, citing *State v. Johnson*, 69 Wn. App. 189, 193, 847 P.2d 960 (1993). Thus, "[s]tatutes authorizing restitution should not be given 'an overly technical construction which would permit the defendant to escape from just punishment.'" *Tobin*, 132 Wn. App. at 175, citing *Johnson*, 69 Wn. App. at

193, 847 P.2d 960 (*quoting State v. Davison*, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991)); *State v. Mead*, 67 Wn. App. 486, 490, 836 P.2d 257 (1992).

Finally, when insurance companies pay benefits to injured insureds, the companies are appropriate recipients of restitution. *State v. Ewing*, 102 Wn. App. 349, 352, 7 P.3d 835 (2000), *citing State v. Barnett*, 36 Wn. App. 560, 562, 675 P.2d 626 (1984).

In the present case, the Defendant argues that the State failed to establish a casual connection between the medical expenses and the crime, *citing State v. Hahn*, 100 Wn. App. 391, 996 P.2d 1125, *review granted* 141 Wn. 2d 1025, 11 P.3d 825 (2000).

In *Hahn*, the defendant plead guilty to two counts of assault in the second degree with deadly weapon enhancements. *Hahn*, 100 Wn. App. at 393. The State sought restitution for the injuries to the two victims, and relied on medical bills to support the amount requested. *Hahn*, 100 Wn. App. at 394. *Hahn* argued that the trial court erred in ordering restitution based solely on the Department of Social and Health Services' report because the report "did not adequately connect the expenditures to the crimes." *Hahn*, 100 Wn. App. at 397. The court agreed, noting that although the record contained information that the victims had injuries, there was no causal connection between the DSHS expenditures and the charged crimes. *Hahn*, 100 Wn.

App. at 400. The court noted that even if it were to infer a connection from the fact that nearly all of the services were provided within five days of the crime, these services only accounted for a fraction of the total claim, leaving a large portion of the claim unexplained. *Hahn*, 100 Wn. App. at 400. The court, therefore, remanded the restitution orders to the trial court for the taking of additional evidence to determine the causal connection between the DSHS expenditures and the charged crimes. *Hahn*, 100 Wn. App. at 400.

In *State v Blanchfeld*, 126 Wn. App. 235, 108 P.3d 173 (2005), the defendant cited *Hahn* and argued that the victim's statement as to her medical expenses and the report from the CVC Program were insufficient to show that those expenses were causally connected to the assault. *Blanchfeld*, 126 Wn. App. at 242. The victim, however, testified that the payments arose from the treatment she received from her injuries caused by the assault. *Blanchfeld*, 126 Wn. App. at 242. The court held that the trial court did not abuse its discretion in basing the amount of restitution for medical expenses on the victim's statement and testimony and the CVC report. *Blanchfeld*, 126 Wn. App. at 242.

In the present case, the probable cause statement described how on August 23, 2004, Dr. Franz was riding a bicycle and was struck by the Defendant's vehicle, and that as a result he suffered numerous injuries and was airlifted to Harborview. CP 4,5. In addition, unlike in the *Hahn* case,

the victim in the present case, Dr. Ernest A. Franz, submitted a victim impact statement that he signed under the penalty of perjury, in which Dr. Franz outlined that as a result of the August 23 incident, he sustained 8 fractured ribs, liver laceration, 2 spine fractures, right leg fracture, compound and open fractures to his upper arms and nerve damage. CP 65. Dr. Franz's victim impact statement also stated that as a result of the incident, his medical expenses exceeded \$236, 327, and that he will continue to incur future medical expenses from his injuries. CP 65-66. Dr. Franz then attached a summary of his medical expenses. CP 67-71. While each line item did not spell out what exact services were performed in detail, unlike in *Hahn*, the trial court in this case had sufficient evidence of a causal connection between the medical expenses and the crime as Dr. Franz specifically stated that the medical expenses were incurred due to the events of August 23, 2004.

The trial court, therefore, did not abuse its discretion in finding that, "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." RP (8/06/05) 5-6. The Defendant's arguments, therefore, must fail.

C. THE TRIAL COURT DID NOT ERR IN FAILING TO CONSIDER THE DEFENDANT'S ABILITY TO PAY PRIOR TO DETERMINING THE PROPER AMOUNT OF RESTITUTION, BECAUSE ABILITY TO PAY IS RELEVANT ONLY TO THE MONTHLY MINIMUM PAYMENT AMOUNT, AND IS NOT RELEVANT TO THE TOTAL AMOUNT OF RESTITUTION.

The Defendant next claims that the court failed to consider his ability to pay, and based the order of restitution "solely on the State's evidence on the victim's losses." App.'s Br. at 22. This claim is without merit because the Defendant's ability to pay is not relevant to the restitution award, rather, it is only relevant to the monthly minimum payment amount, which in this case was set at \$100.

RCW 9.94A.753(1) states that when restitution is ordered, the court shall determine the amount of restitution due. Further,

The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. 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). In the present case, the restitution order incorporated the payment schedule from the Judgment and Sentence, and the Judgment and Sentence set the payment schedule at \$100 a month. CP 39, 163.

The Defendant appears to argue that the trial court abused its discretion in failing to consider the Defendant's ability to pay prior to determining the amount of restitution owed. App.'s Br. at 21-22. The plain language of the statute, however, contains no such requirement. Rather, a Defendant's ability to pay is to be considered in setting the minimum monthly payment.

In *State v Huddleston*, 80 Wn. App. 916, 928, 912 P.2d 1068 (1996), the defendant made a similar argument that a trial court was required to consider ability to pay before setting the restitution amount. The court rejected the defendant's arguments, noting that under a prior version of the statute, the statute merely stated the factors that "the court is to consider when setting a *monthly payment amount*; it does not relieve the court of its obligation to set a *total amount* of restitution, subject to the offender's later ability to pay." *Huddleston*, 80 Wn. App. at 928 (emphasis in original).

Under the current version of the restitution statute, the relevant language is essentially the same as it was in *Huddleston*, and thus the court's analysis in *Huddleston* should apply to the newer statute. The plain language of RCW 9.94A.753(1) supports this position as well. A defendant's ability to pay, therefore, while relevant to the court's determination of a monthly payment, is not relevant to the total amount of restitution awarded. The trial court, therefore, did not abuse its discretion in refusing to consider the

Defendant's ability to pay in setting the amount of restitution, as the court was not required to do so.

Furthermore, as the Defendant points out, the record contains little information on the Defendant's financial condition, but does indicate that the Defendant "lives with his mother and has a part time job." App.'s Br. at 22, citing CP 96. Given these facts, the trial court did not abuse its discretion in setting the monthly payment at \$100.

D. THE DEFENDANT HAS FAILED TO OVERCOME THE STRONG PRESUMPTION THAT COUNSEL'S REPRESENTATION WAS EFFECTIVE BECAUSE HE HAS NOT SHOWN THAT COUNSEL'S REPRESENTATION FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND HAS NOT SHOWN THAT THERE IS A REASONABLE PROBABILITY THAT, EXCEPT FOR COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

The Defendant next claims that he received ineffective assistance of counsel. This claim is without merit because the Defendant has failed to show that counsel's performance fell below an objective standard of reasonableness or that he suffered any prejudice from any claimed failure of his defense counsel, as counsel's extension of the 180 deadline did not result in any prejudice to the Defendant because the documentation relied on by the trial court in setting the restitution award was filed before the extension was

ever entered, and because, despite the large restitution award, the monthly payment amount was set at the extremely low amount of \$100.

On review, a court strongly presumes that counsel's representation was effective. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A two-prong test must be met to demonstrate ineffective assistance of counsel. *See, e.g., State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *rehearing denied*, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984)). First, a defendant must show that his counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances. *McFarland*, 127 Wn.2d at 334-35, 899 P.2d 1251 (*citing Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816). However, "[d]eficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 77- 78, 917 P.2d 563 (1996) (emphasis added) (*citing State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)).

Second, a defendant must show that "defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335, 899 P.2d 1251 (*citing Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816).

The Defendant claims that counsel was ineffective by stipulating to the extension of the 180-day deadline for a restitution determination. Although the Defendant claims that the stipulation was entered, “apparently to accommodate the State’s need for more time to amass evidence to support the Order of Restitution,” the record does not support this claim. App.’s Br. at 24. The Defendant cites to an offhand remark his counsel made at the restitution hearing, where defense counsel stated,

“Our main issue, of course and the initial objection that I had, was with the Safeco insurance claim. Basically we’ve put this over quite a bit trying to get more information from Safeco.”

RP (8/02/05) 16. The record never specifically states that the Defendant agreed to extend the time limit for this reason, and the record is not clear whether it was the state or the Defendant who was seeking additional information. In any event, the information that was provided by Safeco merely stated that they had paid out \$500,000 on an uninsured motorist claim, and had numerous records of medical expenses. The trial court, however, ruled that Safeco’s payment likely covered numerous items that were not covered by the restitution statutes, and thus refused to award Safeco the \$500,000 it had paid out. Rather, the court relied purely on the victim impact statements and the summary of medical expenses that the victim incurred. The victim impact statements and the actual documents outlining the medical

expenses that the trial court relied on at the restitution hearing were filed on April 25, 2005, long before the extension was entered. CP 65-71. The Defendant, therefore, has failed to show that the short extension of the 180 time limit resulted in any prejudice. To the contrary, the record shows that the State had previously filed the necessary documents prior to the date of the order extending the 180-day time period. Whatever the reason for the extension, the record does not support the Defendant's claim on appeal that the extension was entered merely "to allow the State more time to build its case for a higher amount of restitution." App.'s Br. at 24-25.

Defendant further argues that defense counsel's performance was deficient because counsel failed to present evidence concerning the Defendant's ability to pay. As mentioned above, the ability to pay is only relevant to the monthly payment amount, not to the actual restitution award. For this reasons, the Defendant has failed to show that counsel was deficient when the monthly payment was set at \$100. A monthly payment of \$100 appears to the State to be an amount that is inherently and objectively reasonable, and the Defendant has failed to show how such a monthly minimum payment amount prejudiced him in any way given all of the circumstances. For these reasons, the Defendant's argument must fail.

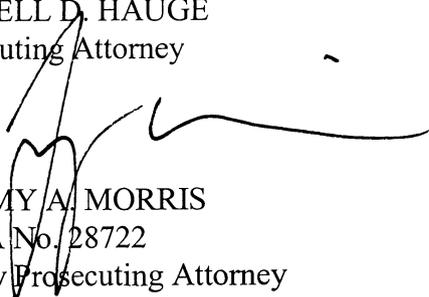
IV. CONCLUSION

For the foregoing reasons, the Defendant's sentence and the order
restitution should be affirmed.

DATED June 20, 2006.

Respectfully submitted,

RUSSELL D. HAUGE
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