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COURT OF APPEALS

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STATE OF WASHINGTON
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NO. 40130-4-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

VIRGIL VELKOV,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable Amber L. Finlay, Judge
Cause No. 09-1-00202-9

BRIEF OF APPELLANT

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09-71-1. vmd

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in entering the restitution orders more than 180 days after Velkov was sentenced.
02. The trial court erred in permitting Velkov to be represented by counsel who provided ineffective assistance by failing to argue that the restitution orders were untimely. of the warrantless search of his vehicle.
03. The trial court erred in imposing restitution for the victim's expenses relating to the victim's fractured jaw where there was insufficient proof of a causal connection between the crime for which Velkov was convicted, assault in the fourth degree, and the injuries sustained by Abrams for which the court ordered restitution.
04. In ordering restitution, the trial court erred in entering finding of fact 4, as fully set forth herein at page 3.
05. In ordering restitution, the trial court erred in entering conclusions of law 1 and 2, as fully set forth herein at pages 3-4.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the restitution orders must be vacated where they were entered more than 180 days after the entry of the judgment and sentence and the State had failed to seek a continuance or good cause?
[Assignment of Error No. 1].

02. Whether the trial court erred in permitting Velkov to be represented by counsel who provided ineffective assistance by failing to argue that the restitution orders were untimely. [Assignment of Error No. 2].
03. Whether the trial court abused its discretion in imposing restitution for the victim's expenses relating to the victim's fractured jaw where there was insufficient proof of a causal connection between the crime for which Velkov was convicted, assault in the fourth degree, and the injuries sustained by Abrams for which the court ordered restitution? [Assignments of Error Nos. 3-5].

C. STATEMENT OF THE CASE

01. Procedural Facts

Virgil Velkov (Velkov) was charged by amended information filed in Mason County Superior Court on October 29, 2009, with assault in the Second degree, contrary to RCWs 9A.08.020 and 9A.36.021(1)(a). [CP 49-50].

Trial to a jury commenced on November 3, the Honorable Amber L. Finlay presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 132]. The jury returned a verdict of guilty of the lesser offense of assault in the fourth degree, a gross misdemeanor, and timely notice of this appeal followed. [CP 2, 13].

Over objection at sentencing on December 7, 2009 [RP 160], and Memorandum in Opposition to Restitution filed March 1, 2010 [CP 90],

the trial court, on March 24, entered an Order of Restitution [CP 87] that did not determine the amount of restitution due, and the following Findings of Fact and Conclusions of Law Re: Order of Restitution:

FINDINGS OF FACT

1. The defendant was charged, as a codefendant, with Second Degree Assault having been charged after being identified as a person associated with an assault that occurred between two groups of individuals at a Mason County campground.
2. A jury found the defendant guilty of the lesser included crime of Fourth Degree Assault for his participation in the assault that occurred to the victim.
3. The victim of the assault was diagnosed with a fractured mandible which required extensive medical intervention to include diagnostic testing, treatment to include his jaw wired shut and other medical and dental procedures relating to the assault.
4. The defendant's actions, conduct and participation in the assault were the proximate cause of the victim's injuries from the assault.

Therefore, the Court makes the following:

II. CONCLUSIONS OF LAW

1. The Court having considered State v. Thomas, 138 Wn. App. 78, 155 P.3d 998 (2007) finds the defendant's actions, conduct and participation were a proximate cause of the victim's injuries.
2. The defendant is jointly and severally liable

with the co-defendant (Talon Newman) for restitution in this matter.

[CP 88-89].

On July 13, the trial court entered an Order of Restitution in the amount of \$13,771.74, to be dispersed as follows: \$3,693.22 to Ashley Abrams and \$10,078.52 to Premera Blue Cross Claim #814368420200.

[CP 82]. On the same day, the trial court entered an Amended Order of Restitution in the amount of \$13,973.61, to be dispersed as follows: \$3,693.22 to Ashley Abrams, \$10,078.52 to Premera Blue Cross Claim #814368420200 and \$201.87 to Crime Victims Compensation. [CP 80-81].

02. Substantive Facts

On May 10, 2009, Ashley Abrams, Matthew Johnson, Brandon Harrison, Tiffany Bartley and Ashley DeMoss decided to go camping. [RP 37]. It was still light when they arrived at the campground. [RP 37]. Several hours later, after it had grown dark, they were sitting around a campfire playing cards and drinking beer when they were visited by a group of people from another campsite, who introduced themselves, talked for a short while and then left. [RP 40-42].

About an hour later, the group returned. [RP 42]. According to Abrams, “(i)t was pitch black 30 and we were out there drinking and these

people came into our campsite saying shit, started scaring the hell out of me.” [RP 44]. As the situation escalated, Abrams went to his car and armed himself with two revolvers, which he covered with his coat, before returning to his chair near the campfire. [RP 44-45, 56]. When he later got to his feet to see what was happening to one of his friends, someone hit him, knocking him to the ground. [RP 45, 56]. “My jaw was completely busted sideways, couldn’t even talk, blood all over my face.”

[RP 45]. While on the ground, Abrams

felt hits on top of the head, and like I felt getting pushed around and tried to get back up and I realized my gun fell out. And I get back up and looking around and some guy is pushing, saying, relax, relax, chill out, it’s all over, it’s all over. You know, I don’t even know who he was.

[RP 46].

When asked if he saw who hit him, Abrams said he “just remember(ed) an orange – a dude in an orange sweatshirt.” [RP 47].

“When I was getting hit, I was seeing orange sweatshirt flapping.” [RP 53]. He did not recall being kicked in the face. [RP 54].

Velkov went to talk to Detective Luther Pittman 18 days after the incident. “He was very cooperative. He came in to talk to us of his own volition.” [RP 66]. Velkov explained that he was at the campsite talking with a couple of people when he saw one of his friends fighting with Abrams on the ground. [RP 65, 68]. He then “ran over to help his friend

and he admitted to punching Mr. Abrams in the face a couple of times.”

[RP 63]. Velkov denied ever kicking Abrams. [RP 65].

Talon Newman, who was also at the campsite, admitted to Detective Pittman that he had hit Abrams hard, a fact that Pittman corroborated with other witnesses. [RP 67]. Newman also admitted to Deputy Chris Mondry that he had struck Abrams in the face. [RP 78].

The parties stipulated that two days after the incident Abrams was treated in the emergency room of a hospital “for a mandible (jaw) fracture alleged to have occurred during an assault on or about May 10, 2009.” The “jaw was broken in two places” [RP 71]. The parties also stipulated that Abrams “sustained a displaced fracture of the jaw and surgical intervention was required to stabilize the jaw and allow it to repair correctly.” [RP 71]. A portion of Abrams’s jaw was repaired “by fixing a mini plate in Mr. Abrams’ (sic) jaw and that the plate remains a permanent fixture in Mr. Abrams’ (sic) jaw.” Abrams’s jaw was “also wired shut for at least 28 days to stabilize the jaw to allow for proper healing.” [RP 72].

Jeffrey Baker, who was also at the campsite, was identified by the police and Ashley DeMoss as the person who was wearing the orange sweatshirt. [RP 77, 89].

DeMoss asserted that Talon Newman initially put Johnson on the ground before hitting Harrison and then Abrams. [RP 85]. Although she

saw two other people hit Abrams, she did not see Velkov hit him. [RP 85]. She said Newman and the two other people were punching and kicking Abrams while he was on the ground. [RP 85]. Newman “was punching, kicking, whatever he could do to, you know, hurt him.” [RP 91]. She also saw Baker, who was wearing the orange sweatshirt, hitting Abrams. [RP 89].

Tiffany Bartley, who placed herself at five on a scale of one to ten regarding how intoxicated she was at the time of the incident [RP 102], thought it was Velkov who was wearing the orange sweatshirt and hitting and kicking Abrams. [RP 99-100]. Dennis Simons, Talon Newman’s brother, saw Justin Wright knock Abrams “on his ass.... [RP 109](,)” adding that Velkov “came towards the end of it” [RP 110]. Like Bartley, he thought Velkov was the one wearing the orange sweatshirt who punched and kicked Abrams in the face while he was on the ground. [RP 110, 113].

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D. ARGUMENT

01. THE RESTITUTION ORDERS MUST BE VACATED WHERE THEY WERE ENTERED MORE THAN 180 DAYS AFTER ENTRY OF THE JUDGMENT AND SENTENCE AND THE STATE HAD FAILED TO SEEK A CONTINUANCE FOR GOOD CAUSE.

The authority to order restitution is derived solely from statute. State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). RCW 9.94A.753(1) provides that the amount of restitution shall be set at the sentencing hearing or within 180 days unless the court continues the restitution hearing beyond the period for good cause. RCW 9.94A.753(1) provides for an exception to this requirement in RCW 9.94A.753(7), which provides that if no restitution order has been entered and the victim is entitled to benefits through the crime victims' compensation act, the Department of Labor and Industries has one year from sentencing to petition for entry of a restitution order.

Here, the order and amended order for restitution entered on July 13, 2010 [CP 80-83], were untimely because they were entered beyond the 180-day period and the State had failed to seek a continuance for good cause.

To recap what happened, quickly: Velkov was sentenced on December 7, 2009. [CP 3-12]. The following March 24, the trial court

entered findings and conclusions [CP 88-89] and an order of restitution [CP 87], neither of which determined the amount of restitution due. While the order and amended order entered on July 13, did respectively set the amount of restitution due, this occurred 218 days following Velkov's sentencing (12/07/09 – 07/13/10 = 218), or 38 days beyond the 180 day limit required in RCW 9.94A.753(1).

On June 4, 2010, which was within one year of Velkov's judgment and sentence the previous December 7, the Department of Labor and Industries, pursuant RCW 9.94A.753(7), filed with the court a request for restitution in the amount of \$201.87, which was included in the amended restitution order entered on July 13. [CP 81].

Accordingly, with the possible exception of the \$201.87 allotted under the provisions of RCW 9.94A.753(7), the restitution orders must be vacated because they were entered more than 180 days after Velkov was sentenced and the State had failed to seek a continuance for good cause.

02. VELKOV WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO ARGUE THAT THE RESTITUTION ORDERS WERE UNTIMELY.¹

A criminal defendant claiming ineffective

¹ While it is submitted that this issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of issues addressed on appeal, see State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

Should this court find that trial counsel waived the error claimed and argued in the preceding section of this brief by failing to argue that the restitution orders were untimely, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to so act, and if counsel had done so, the orders or restitution would not have been entered under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to argue that the restitution orders were untimely, the orders would not have been entered obligating Velkov for the amounts of restitution listed therein.

Counsel's performance was deficient because he failed to move to argue that the restitution orders were untimely, which was highly prejudicial to Velkov, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to

have the restitution orders vacated, as argued in the preceding section of this brief.

03. THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING RESTITUTION FOR THE VICTIM'S EXPENSES RELATING TO THE VICTIM'S FRACTURED JAW WHERE THERE WAS INSUFFICIENT PROOF OF A CAUSAL CONNECTION BETWEEN THE CRIME FOR WHICH VELKOV WAS CONVICTED, ASSAULT IN THE FOURTH DEGREE, AND THE INJURIES SUSTAINED BY ABRAMS FOR WHICH THE COURT ORDERED RESTITUTION.

As previously noted, the authority to impose restitution derives entirely from statute. State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). In the absence of the defendant's "express agreement(,)" the court may not impose restitution beyond the crime charged. State v. Dauenhauer, 103 Wn. App. 373, 378, 891 P.2d 40, review denied, 143 Wn.2d 1011 (2001) (citing State v. Woods, 90 Wn. App. 904, 908, 953 P.2d 834 (1998)); See also RCW 9.94A.753(5).

In other words, restitution cannot be imposed based on a defendant's "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charge. Woods, 90 Wn. App. at 907-08; Hartwell, 38 Wn. App. at 141. When the court fails to adhere to these principles, its restitution order is void. State v. Duback, 77 Wn. App. 330, 332-33, 891 P.2d 40 (1995). [Emphasis added].

State v. Dauenhauer, 103 Wn. App. at 378.

In ordering restitution, the lower court must find that the victim's loss was causally connected to the crime for which the defendant was convicted before ordering restitution. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999). A sufficient causal connection exists when, but for the offense committed, the loss would not have occurred. State v. Hahn, 100 Wn. App. 391, 399, 996 P.2d 1125 (2000). A causal connection is not established simply because a victim submits proof of expenditures. State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000).

The prosecution bears the burden of proving by a preponderance of the evidence the causal connection "between the crime ... and the injuries for which compensation is made." State v. Clapp, 67 Wn. App. 263, 276, 834 P.2d 1101 (1992), reviewed denied, 121 Wn.2d 1020 (1993). Where a court orders restitution for losses not causally related to the offense or fails to follow the statutory requirements, the court "exceeds its statutory authority" and reversal is required." State v. Vinyard, 50 Wn. App. 888, 891, 751 P.2d 339 (1988).

A trial court's order of restitution will not be overturned on appeal absent an abuse of discretion. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). "A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." State v. Wade,

138 Wn.2d 460, 464, 979 P.2d 850 (1999). This court will overturn factual findings of a lower court only if there is insufficient evidence to support a rational person's conclusion that the challenged fact was true. State v. Thomas, 139 Wn. App. 78, 83, 155 P.3d 998 (2007) (citing State v. Halstien, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993)).

Given that Velkov was convicted of assault in the fourth degree, which, unlike assault in the second degree, does not require substantial bodily harm, it can be assumed that the jury did not unanimously find a causal connection between Abrams's fractured jaw and Velkov's actions, at least by a standard of beyond a reasonable doubt. This standard, however, as it relates to causation, "is neither a legal nor a factual bar to the trial court finding (causation), at a restitution hearing," State v. Thomas, 138 Wn. App. at 83, where the trial court, as previously noted, is permitted to find causation by a preponderance of the evidence. State v. Kinneman, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004). Nevertheless, this reduced standard is of slight benefit to the State under the unique facts of this case, where there was precious little proof that Velkov was the source of Abrams's injuries. According to Simons, Velkov wasn't even involved until "the end of it" [RP 110]. Prior to that, Newman, Baker and Wright had assaulted Abrams and knocked him to the ground, with Wright delivering what Simons termed a "Superman punch," "like a – you

kind of go running at somebody and jump through the air” [RP 118].

The evidence showed that Wright, whom the police determined was wearing the orange sweatshirt, had knocked Abrams “on his ass” and that Newman had hit Abrams “hard” in the face before Velkov ran over to the scene, where, as he later voluntarily admitted, he hit Abrams a couple of times in the face. No evidence was presented that he was acting in concert with the others. There was no plan nor agreement between or among Velkov and the others to assault Velkov. There was no evidence that he had any prior knowledge that the others intended to commit the crime of assault by attacking Abrams. Velkov was not an accomplice. See State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000). There was insufficient evidence in the record to conclude by a preponderance of the evidence that that Velkov’s actions caused Abrams’s injuries, with the result that this court must vacate the restitution order against Velkov.

E. CONCLUSION

Based on the above, Velkov respectfully requests this court to vacate the restitution order consistent with the argument presented herein.

DATED this 14th day of July 2010.

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