

COURT OF APPEALS
DIVISION II

NO. 41354-0-II

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STATE OF WASHINGTON

BY *[Signature]*
DEPUTY

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

STATE OF WASHINGTON, RESPONDENT

v.

CHARLES P. OSLAKOVIC, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 09-1-00389-2

Response Brief

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion when it determined a causal connection existed between defendant's driving under the influence and the victim's injury?

2. Is a trial court's factual determination during a restitution hearing limited by its factual findings during a *Knapstad*¹ motion?

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecuting Attorney's Office (State) charged Charles Peter Oslakovic, defendant, with vehicular assault and failure to remain at injury accident on January 22, 2009, under cause number 09-1-00389-2. CP 52-53.² The charges were amended to include a misdemeanor, driving under the influence of intoxicants (DUI). CP 1. The court, during a pre-trial motion conducted by the Honorable Frederick W. Fleming, granted defendant's *Knapstad* motion to dismiss the vehicular

¹ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

² The State has filed a supplemental designation of clerk's papers for the information and estimated the pagination of CP 52 ff.

assault charge on November 5, 2009. 11/5/2009 RP 24.³ On the same day, defendant entered an *Alford/Newton*⁴ plea, pleading guilty to the remaining charges, DUI and failure to remain at injury accident. CP 3–11.⁵ The court accepted his plea of guilty. 11/5/2009 RP 30–31.

Sentencing was conducted on December 4, 2009. 12/4/2010 RP 1. The victim’s mother, father, employer, and the victim herself all addressed the court at sentencing. 12/4/2010 RP 9–29. The court sentenced defendant to 12 months in custody for the failure to remain at injury accident, and an additional 180 days in custody for the DUI. *Id.* at 41. His sentences were run consecutively. *Id.* Defense counsel objected only to the issue of the sentences running consecutively during sentencing. *See id.* at 42–45. For reasons not discussed in the record, the State requested that the court postpone imposing restitution until a later date. *Id.* at 8. The court did postpone the issue of restitution. CP 56.⁶

³ The proceeding’s transcript was filed in the Superior Court file and transmitted to the Court of Appeals under a separate cover. As it was not indexed as clerk’s papers or given page numbers, the State will reference the transcript as “11/5/2009 RP” throughout its brief. The transcript also contains the plea proceeding.

⁴ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970); *see also State v. Newton*, 87 Wn.2d 266, 27 P.3d 192 (2001).

⁵ The statement of defendant on plea of guilty to non-sex offense, filed 11/5/2009, was designated twice as clerk’s papers: CP 3–11, and CP 41–49. Due to the redundancy, the State will refer to the statement under the first designation, CP 3–11.

⁶ Page 3 of the judgment and sentence, count I. The State filed a supplemental designation of clerk’s papers for the judgment and sentence for both of defendant’s DUI and felony counts, estimating the pagination as CP 54–63.

Although the court ordered a restitution hearing for February 4, 2010, the hearing did not occur until October 15, 2010.⁷ 10/15/2010 RP 1–7. In the meantime, the victim to the incident continued to recover from her injuries. While the restitution hearing was still pending, defendant appealed his judgment and sentence. *See State v. Oslakovic*, 159 Wn. App. 1014, WL 61625 (2011). He argued that his equal protection rights had been violated when the court imposed consecutive sentences for the felony and misdemeanor. *Id.* at 1–2. The Court of Appeals affirmed the trial court’s judgment and sentence on January 4, 2011. *Id.* at 3.

After his original appeal had been decided, the trial court conducted the restitution hearing. 10/15/2010 RP 1–7. The State argued that restitution should be ordered because a causal connection existed between the victim’s injuries and defendant’s driving under the influence. *Id.* at 4–5. Defendant argued there was no causal link, and therefore restitution was inappropriate. *Id.* at 5. The Court held that there was a causal connection and granted restitution in the amount of \$94,223.19. *Id.* at 5–6. The court filed the restitution and disbursement order on October 15, 2010. CP 29–30.

This appeal timely follows. CP 31–33.

⁷ The court rescheduled several times although the record does not indicate a reason.

2. Facts

On April 3, 2008, defendant was driving a 1998 Lincoln Navigator southbound on I-5 around 10:30 p.m. CP 39. Witnesses observed his passenger, Amy Roznowski, standing on the running board, clinging to the outside of the passenger side as defendant sped down the freeway. *Id.* Defendant continued at a speed of 70–75 miles per hour for approximately one-half of a mile before Ms. Roznowski fell off of the vehicle’s side and came to a rest in the lane of traffic. *Id.* Witnesses were able to stop and block the lane from oncoming traffic. *Id.* Defendant continued driving without rendering aid. *Id.*

A local trooper, who had been informed about the incident and was on the lookout for defendant, identified defendant’s vehicle at a traffic light on the off ramp to northbound Portland Avenue. CP 39. After the trooper stopped and questioned Mr. Oslakovic, defendant admitted to driving the vehicle while watching Ms. Roznowski exit, step onto the running board, disappear, and continue without rendering aid. *Id.* The trooper noted defendant’s eyes were bloodshot and watery, and that his breath smelled of intoxicants. *Id.* Defendant admitted he had been drinking. *Id.* Defendant’s blood was later analyzed and returned with a blood-alcohol level over the legal limit at .09 grams of alcohol per 100mL. *Id.* at 40.

Defendant stated that he had picked up Ms. Roznowski from the airport when they decided to get dinner. *Id.* There, defendant consumed alcohol and purchased a bottle of wine to take with him. *Id.* at 39. He explained that at some point during the ride, Amy became upset at him, opened the passenger side door, and stepped onto the running board. *Id.* at 40. He then recalled her disappearing. *Id.* Defendant stated that he was on his way back to see what happened when troopers inquired why he did not stop to render aid. *Id.*

Ms. Roznowski was transported to a local hospital to be treated for injuries. CP 39. Her injuries included a complex scalp laceration, multiple rib fractures, and a metacarpal fracture. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION ORDERING RESTITUTION WHERE IT DETERMINED A CAUSAL LINK EXISTED BETWEEN DEFENDANT'S CONDUCT AND THE VICTIM'S INJURIES.

a. The causal link between defendant's DUI and the victim's injuries.

The trial court's imposition of restitution will not be disturbed absent an abuse of discretion.⁸ *State v. Keigan*, 120 Wn. App. 604, 609, 86

⁸ Defendant argues the appellate court reviews this issue de novo. Brief for Appellant at 7. However, precedent holds this review to an abuse of discretion standard. *See e.g., State v. Kisor*, 68 Wn. App. 610, 619, 844 P.2d 1038 (1993).

P.3d 798 (2004); *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). An abuse of discretion occurs when the court's action is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Keigan*, 120 Wn. App. at 609, quoting *State v. Donahoe*, 105 Wn. App. 97, 100, 18 P.3d 618 (2001).

The court's authority to order restitution is statutory. RCW 9.94A.753(5). The applicable statute states:

"Restitution *shall* be ordered *whenever* the offender is convicted of an offense which results in injury to any person . . . In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement."

RCW 9.94A.753(5) (emphasis added); *see also* RCW 9.92.060(2).

The very language of statutes authorizing restitution indicates a legislative intent to grant broad powers of restitution. *State v. Wilson*, 100 Wn. App. 44, 48, 995 P.2d 1260 (2000), quoting *State v. Davison*, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991); *State v. Hennings*, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). The courts must interpret these statutes broadly to carry out the expressed intent of the legislature. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007); *Davison*, 116 Wn.2d at 920. "Restitution is an integral part of the Washington system of criminal

justice,” and the statutes indicate “a strong public policy to provide restitution *whenever possible*.” *State v. Thomas*, 138 Wn. App. 78, 82, 155 P.3d 998, (2007), quoting *State v. Shannahan*, 69 Wn. App. 512, 517–518, 849 P.2d 1239 (1993) (emphasis added). The statutes are intended to require the defendant to face the consequences of his criminal conduct. *Tobin*, 161 Wn.2d at 524.

Restitution is appropriate when there is a causal connection between the underlying facts of the crime charged and the injury to the victim. *State v. Coe*, 86 Wn. App. 841, 843, 939 P.2d 715 (1997). The court employs a “but-for” analysis when determining whether a causal connection exists. See *Thomas*, 138 Wn. App. at 82. The court is not limited by the name or elements of a particular crime when determining restitution. See *id.* at 82–83. The State’s burden of proof for establishing causation for restitution purposes is “merely a preponderance of the evidence.” *Id.* at 83.

In *Thomas*, the defendant struck another person’s vehicle while driving under the influence of alcohol and injured her passenger. 138 Wn. App. at 80. The State charged her with one count of vehicular assault. *Id.* Both the State and defense offered evidence on whether or not defendant caused the accident. *Id.* The jury found her guilty of a lesser crime, driving under the influence of alcohol. *Id.* at 81. At the restitution hearing, the trial court ordered her to pay restitution because at least “*one of the causations*

of the accident was [Thomas] being under the influence of alcohol.” *Id.* (emphasis added). The Court of Appeals affirmed the trial court’s order of restitution because the trial court based its decision on a preponderance of the evidence. *Id.* at 85.

In this case, the court properly ordered Mr. Oslakovic to pay restitution because it found a causal link between his DUI and the victim’s injuries. RP 6. During the restitution hearing, the court found, “I’m of the belief that there was a proximate cause connection between the DUI and his driving and, therefore, the injuries that occurred to the young lady. And I’m going to find that, therefore, restitution is applicable.” *Id.*

Several compelling reasons support the court’s decision. Defendant agreed to let the court use the declaration for determination of probable cause to find a factual basis for the charges when he signed the plea form. CP 10; *see also* 10/15/2010 RP 6. Those facts overwhelmingly support the court’s decision.

The defendant, under the influence of alcohol, sped down the freeway at approximately 70–75 m.p.h. and admitted to watching Ms. Roznowski open the door, remove herself from the vehicle, and step onto the running board. CP 39–40. Instead of stopping or even slowing down like any reasonable person, defendant continued driving in this manner for upwards to a half mile. *Id.* When the victim fell off the vehicle and onto the freeway, sustaining several injuries, he proceeded on his way without reducing his speed or rendering aid. *Id.*

The trial court found that defendant's DUI contributed to her injuries. 10/15/2010 RP 5–6. Similar to *Thomas*, the court found Mr. Oslakovic's actions constituted one of the causations of the accident. *Id.* It stated, “[Defendant's actions] could be a proximate cause.” *Id.*

Because the court found a causal connection between defendant's DUI and the victim's injury, it properly ordered restitution pursuant to RCW 9.94A.753. Not only does legislation mandate restitution, but public policy also requires restitution whenever possible. *Thomas*, 138 Wn. App. at 82. In this case, it was possible for the court to order restitution because defendant's criminal driving caused Ms. Roznowski's injuries. Defendant's actions fall squarely under the restitution public policy condones. This Court should affirm the trial court's order.

- a. Defendant had notice that the State would seek restitution.

Defendant argues that the trial court abused its discretion because he was not informed about restitution when he pleaded guilty. *See* Brief for Appellant at 8. He relies on *State v. Tracy*, 73 Wn. App. 386, 869 P.2d 425 (1994), to support his claim. *Id.* However, defendant does not include some of the important factors the *Tracy* court considered when it reversed the trial court's restitution order.

In *Tracy*, the defendant was ordered to pay restitution after signing a plea agreement. 73 Wn. App. at 387. Defendant claimed he had not been informed about the *possibility* of paying restitution prior to the court accepting his plea. *Id.* at 388. At the sentencing hearing, the prosecutor explicitly stated that restitution was not part of the plea agreement. *Id.* at 387. Because the defendant had not been informed about restitution before the trial court accepted his plea, as admitted by the State, the appellate court reversed the restitution order. *Id.* at 389.

In Mr. Oslakovic's case, however, the record reflects that defendant understood restitution would be ordered. First, whereas the prosecutor in *Tracy* informed the court that restitution was not part of the plea, the State in this case recommended restitution during sentencing. 12/4/2009. RP 8. Here, the prosecutor explicitly stated, "We'd ask for restitution by later court order. We'd ask the Court to set a date 60 days out from today." *Id.* The defendant and his attorney were present when that specific recommendation was made. *Id.* at 3. The court then offered defendant a chance to object to any of the recommendations, but he failed to object to the state's recommendation for restitution. *See id.* at 42–45.

The trial court followed the recommendation during sentencing and stated, “I was specific for inquiring of your counsel and counsel for the State regarding the recommendation and your plea, . . . So, I’m going to follow the recommendation in the defense change of plea of guilty.” *Id.* at 40–41. Apparently, only after the fact that defendant had been convicted, sentenced, and a restitution hearing scheduled did he dispute whether he should be ordered to pay restitution arising from his criminal behavior.

The judgment and sentence, which the defendant signed, also informed him of the possibility of restitution. CP 56. One of the boxes on the judgment and sentence, filled in with a mark, states, “The above total does not include all restitution which may be set by later order of the court.” *Id.* It is apparent that both parties intended a restitution hearing to occur sometime after the judgment and sentence. Defendant was in fact informed about the possibility of paying restitution.

The trial court properly ordered restitution under RCW 9.94A.753(5) after it found a causal link between defendant’s crimes and the victim’s injuries. It did not abuse its discretion. This Court should affirm the trial court’s order.

2. THE TRIAL COURT'S FACTUAL FINDINGS DURING THE KNAPSTAD MOTION DO NOT PRECLUDE THE COURT'S FINDINGS DURING THE RESTITUTION HEARING

The purpose of a *Knapstad* motion is to permit a trial court to conduct a pretrial determination of the law in cases where the facts are not in dispute. *Knapstad*, 107 Wn.2d at 355. The trial court may dismiss a charge if the State's pleadings are "insufficient to raise a jury issue on all elements of the charge." *Id.* at 352. For example, in *Knapstad*, the reviewing court held that the trial court was permitted to dismiss a charge because "no rational trier of fact could have found *beyond a reasonable doubt* the essential elements of the crime." *Id.* at 349.

However, the rules governing a trial court's analysis differ in a restitution hearing than they do during a *Knapstad* motion. The burden of proof is a mere preponderance of the evidence during a restitution hearing. *Thomas*, 138 Wn. App. at 83. A trial court is not limited by the name or elements of a particular crime when determining restitution. *See id.* at 82–83. "A defendant who causes an accident while committing DUI may be ordered to pay restitution for accident damages." *Id.*

In Mr. Oslakovic's case, the trial court's causation analysis in the *Knapstad* motion regarding the vehicular assault charge did not preclude it from making a factual determination for restitution later. The trial court expressly stated that the causation analysis it employed during the

Knapstad motion was solely for the vehicular assault charge. 11/05/2009 RP 24. The court stated that because there “[wasn’t] any evidence that [defendant] *assaulted* her . . . I’m going to grant the motion to dismiss it as far as that aspect of it is concerned, that is, *the vehicular assault.*” *Id.* (emphasis added). Nevertheless, the court continued, “And I’m not addressing the DUI.” *Id.* Later, during the restitution hearing, the court later addressed the DUI charge and found a causal link existed. 10/15/2010 RP 5–6. The trial court did not err by separating the two analyses.

The trial court properly used the declaration for determination of probable cause during the restitution for a factual basis. 10/15/2010 RP 6. Those facts included the defendant speeding on I-5 at nighttime while under the influence of alcohol. CP 39. It also describes the shock of those who witnessed the event when defendant continued to speed away after his passenger fell off the vehicle and came to a rest in the lane of travel. *Id.* From these facts, the court properly concluded that defendant’s actions were a proximate cause of the victim’s injuries. 10/15/2010 RP 6. By a preponderance of the evidence, a reasonable fact finder could find more likely than not Ms. Roznowski’s injuries flowed from defendant’s criminal behavior.

D. CONCLUSION.

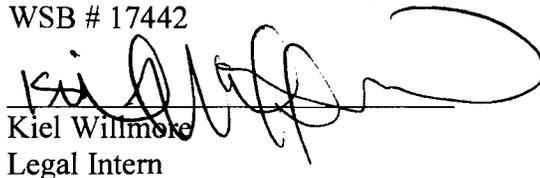
This Court should affirm the trial court's restitution order because it properly determined a causal connection between defendant's conduct and the victim's injuries. Similar to *Thomas*, the trial court could find under a preponderance of the evidence that defendant, while driving under the influence, caused his victim to fall from his vehicle and sustain several injuries. Legislation and public policy require the court to impose restitution whenever possible, especially when defendant's conduct causes the injury. For these reasons, this Court should affirm the restitution order.

DATED: July 14, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



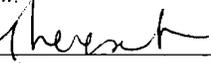
THOMAS ROBERTS
Deputy Prosecuting Attorney
WSB # 17442



Kiel Willmore
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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STATE OF WASHINGTON
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