

NO. 41803-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

TROY SCHOENBEIN,

Appellant.

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

The Honorable Bryan Chushcoff, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issues Presented on Appeal	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS.....	2
a. Sentencing.....	3
b. Restitution.....	4
C. <u>ARGUMENT</u>	4
1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GIVE A SELF DEFENSE INSTRUCTION.....	4
2. THE TRIAL COURT'S IMPOSITION OF 365 DAYS IN JAIL FOR A FIRST OFFENSE, A MINOR ASSAULT IN THE FOURTH DEGREE IN "CRUEL" AND VIOLATES ARTICLE ONE, SECTION 14 OF THE WASHINGTON STATE CONSTITUTION.....	8
3. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING SCHOENBEIN TO ONE YEAR IN JAIL FOR AN ASSAULT IN THE FOURTH DEGREE GROSS MISDEMEANOR THAT WAS A FIRST CRIMINAL CONVICTION.....	13

TABLE OF CONTENTS

Page

4. THE TRIAL COURT EXCEEDED ITS
AUTHORITY WHEN IT ORDERED
RESTITUTION FOR INJURIES WHICH
DID NOT RESULT FROM THE
ASSAULT IN THE FOURTH DEGREE
CONVICTION.....16

D. CONCLUSION.....19

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>Federated Publications, Inc. v. Kurtz</i> , 94 Wn.2d 51, 615 P.2d 440 (1980).....	9
<i>State v. Aleshire</i> , 89 Wn. 2d 67, 568 P. 2d 799 (1977).....	7,8
<i>State v. Barragan</i> , 102 Wn.App. 754, 9 P.3d 942 (2000).....	7
<i>State v. Blanchfield</i> , 126 Wn. App. 235, 108 P.3d 173 (2005);	
<i>State v. Bowen</i> , 51 Wn. App. 42, 751 P.2d 1226 (1988).....	11,13
<i>State v. Callahan</i> , 87 Wn.App. 925, 943 P.2d 676 (1997).....	5-8
<i>State v. Davis</i> , 60 Wn.App. 813, 808 P.2d 167, review granted 118 Wn.2d 1027, 828 P.2d 564, affirmed 119 Wn.2d 657, 835 P.2d 1039, reconsideration denied (1991).....	12
<i>State v. Davison</i> , 116 Wn .2d 917, 809 P.2d 1374 (1991).....	16
<i>State v. Derefield</i> , 5 Wn. App. 798, 491 P.2d 694 (1971).....	14, 15
<i>State v. Fain</i> , 94 Wn.2d 387, 617 P.2d 720 (1980).....	9, 10
<i>State v. Gogolin</i> , 45 Wn.App. 640, 727 P.2d 683 (1986).....	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, continued

<i>State v. Hahn</i> , 100 Wn.App. 391, 996 P.2d 1125, <i>review granted</i> , 141 Wn.2d 1025(dismissed Nov. 30, (2000).....	17
<i>State v. Kinneman</i> , 155 Wash.2d 272, 119 P.3d 350 (2005).....	17, 18
<i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	4, 5
<i>State v. Morin</i> , 100 Wn. App. 25, 995 P.2d 113, <i>review denied</i> , 142 Wn.2d 1010 (2000).....	9
<i>State v. Madsen</i> , 168 Wn.2d 496, 229 P.3d 714 (2010).....	14, 16
<i>State v. Pottorf</i> , 138 Wn.App. 343, 156 P.3d 955 (2007).....	7
<i>State v. Read</i> , 147 Wn.2d 238, 53 P.3d 26 (2002).....	6
<i>State v. Riley</i> , 137 Wn.2d 904, 976 P.2d 624 (1999).....	4
<i>State v. Rohrich</i> , 149 Wash.2d 647 71 P.3d 638 (2003).....	14
<i>State v. Smith</i> , 93 Wn.2d 329, 610 P.2d 869 (1980).....	14, 15
<i>State v. Tobin</i> , 161 Wn.2d 517, 166 P.2d 1167 (2006).....	18

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, continued

<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	4-6, 8
<i>State v. Williams</i> , 132 Wn.2d 248, 937 P.2d 1052 (1997).....	4, 6
<i>State v. Woods</i> , 90 Wn.App. 904, 953 P.2d 834 (1998).....	16-19

FEDERAL CASES

<i>Coker v. Georgia</i> , 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).....	10, 13
--	--------

STATUTES, RULES AND OTHERS

Washington Const. art. 1, section 14.....	9,11
RCW 9A.04.020.....	10,11
RCW 9A.36.011.....	12
RCW 9A.36.031.....	10, 13
RCW 9A.36.041.....	9, 10
RCW 9.94A.510.....	11,13
RCW 9.94A.515.....	13
RCW 9.94A.753.....	17
California Penal Code 242.....	12

A. ASSIGNMENTS OF ERROR

1. The trial court violated the Washington State Constitution's prohibition against cruel punishments when it imposed 365 days I jail for a first offense, an assault in the fourth degree.

2. The trial court abused its discretion by imposing a 365 day jail term for a first offense, an assault in the fourth degree.

3. The trial court committed reversible error when it refused to provide a self-defense instruction.

4. The trial court erred when it imposed restitution beyond the scope of the crime.

Issues Presented on Appeal

1. Did the trial court violate the Washington State Constitution's prohibition against cruel punishments when it imposed 365 days I jail for a first offense, an assault in the fourth degree?

2. Did the trial court abuse its discretion by imposing a 365 day jail term for a first offense, an assault in the fourth degree?

3. Did the trial court commit reversible error when it refused to provide a self-defense instruction?

4. Did the trial court err when it imposed restitution beyond the scope of the crime?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Frank Schoenbein was charged with assault in the first degree. CP 76. Following a jury trial, the honorable Judge Chushcoff presiding, Mr. Schoenbein was acquitted of assault in the first degree and found guilty of assault in the fourth degree. CP 74-75.

The trial court denied the defense motions for a mistrial due to repeated and flagrant prosecutorial misconduct. RP 1130, 1299-1300. The prosecutor committed misconduct more than _times.

The trial court imposed a 365 day jail term. CP 87-91. The trial court denied the defense motion to reconsider the sentence. CP 98. This timely appeal follows. CP 99-104.

2. SUBSTANTIVE FACTS

James Doffing is a 6'3" twenty two year old man. RP 282, 350. Mr. Doffing is a friend of Mr. Schoenbein's, who punched Mr. Matesa in the head near his eye two times, sending Mr. Matesa to the ground and injuring Mr. Matesa's eye. RP 241, 306-313, 1000. Mr. Doffing hit Mr. Matesa because he was beating up Mr. Schoenbein. RP 294-302, 1040-

1041. As a result of the injuries, Mr. Matesa lost his eye. RP 491. Mr. Matesa did not know who hit him but blamed Mr. Schoenbein whom he had been feuding with as a neighbor for years. RP 520, 807, 911, 914, 1092. Mr. Matesa often uses obscene gestures when he sees Mr. Schoenbein and makes racially insulting comments. RP 560, 564, 871-872, 919, 1093-1096. Mr. Matesa told the jury that he believed he was punched in the chest. RP 805. Mr. Matesa's medical chart noted "assault eye/chest". RP 471. Mr. Schoenbein denied striking Mr. Matesa. RP 1104-1106.

a. Sentencing

The trial court imposed 365 days with zero days suspended for the assault in the fourth degree because "he [Mr. Schoenbein] also has a significant part in what happened here." RP 1345. The defense filed a motion to reconsider the sentence, which the court denied. RP 1388-1390. The court discussed at length its reason for denying the motion based on the trial court's belief that Mr. Schoenbein either inflicted the grievous bodily injury but did not intend to do so or he did not inflict grievous injury but intended to do so. The Court improperly imposed a sentence for the injury to Mr. Matesa's eye, even though Mr. Schoenbein was acquitted of the charge of assault in the first degree. RP 1388-90.

b. Restitution

Mr. Schoenbein objected the court's imposition of restitution in the amount of \$12,509.57. RP 7-10, 12-16 (June 10, 2011).

C. ARGUMENT

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GIVE A SELF DEFENSE INSTRUCTION.

Although Mr. Schoenbein denied hitting Mr. Matesa, Mr. Matesa testified that Mr. Schoenbein struck him multiple times. RP 797, 804, 805, 807, 889, 11-4-1106. This evidence from Mr. Matesa supported the self-defense theory.

Jury instructions are only sufficient if they allow the parties to argue their theories of the case and properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Each party may instruct the jury on its theory of the case as long as evidence exists to support that theory. Failure to instruct on a defense theory supported by the evidence constitutes reversible error. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).

A trial court must provide a self-defense instructions if there is some evidence tending to prove that the circumstances amounted to self-

defense. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). A trial court may only refuse to give a self-defense instruction only where no credible evidence supports the claim. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). That evidence can come from any source. *McCullum*, 98 Wn.2d at 488. When deciding this issue, the trial court reviews the entire record in the light most favorable to the defendant. *State v. Callahan*, 87 Wn.App. 925, 933, 943 P.2d 676 (1997).

The test for whether the defendant met his burden of producing “some evidence” incorporates both a subjective and objective component. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The subjective component requires the trial court to stand in the defendant's shoes and evaluate the defendant's actions in light of all the facts and circumstances known to the defendant. *Walker*, 136 Wn.2d at 772; *Janes*, 121 Wn.2d at 238. The objective component requires the trial court to determine what a reasonably prudent person would have done in the defendant's situation. *Walker*, 136 Wn.2d at 772-73.

Proving self-defense requires evidence that (1) the defendant subjectively feared imminent danger of death or great bodily harm, (2) the defendant's fears were objectively reasonable, (3) the defendant used no greater force than reasonably necessary, and (4) the defendant was not

the aggressor. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010); *Callahan*, 87 Wn.App. at 929, 943 P.2d 676. Imminent danger need not actually exist as long as a reasonable person in defendant's situation could have believed it existed. *Walker*, 136 Wn.2d at 772, 966 P.2d 883. Imminence does not require an actual physical assault; a threat can support a finding of imminence where the defendant actually and reasonably believed the threat would be carried out. *Janes*, 121 Wn.2d at 241. If some evidence supports all elements of self-defense, then the court must permit the presentation of self-defense instructions to the jury. *Walker*, 136 Wn.2d at 772-73, 966 P.2d 883; *Williams*, 132 Wn.2d at 259-60.

When analyzing a trial court's refusal to permit jury instructions on self-defense, the standard of review depends on whether the trial court based its decision on a matter of law or of fact. *Walker*, 136 Wn.2d at 771. This Court reviews de novo a trial court's finding that no reasonable person in Mr. Schoenbein's shoes would have acted as he acted. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

The trial court was incorrect in denying the self-defense instruction because there was some evidence of self-defense. It did not matter that Mr. Schoenbein denied hitting Mr. Matesa. In 1977, The Supreme Court

held that “[o]ne cannot deny that he struck someone and then claim that he struck them in self-defense.” *State v. Aleshire*, 89 Wn. 2d 67, 71, 568 P. 2d 799 (1977) (denying defendant’s request for self-defense instructions where he expressly denied participating in the bar fight giving rise to his assault charge). Since then, Divisions One and Three have held that a defendant cannot receive self-defense instructions when denying committing the act underlying the charged crime. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000); *State v. Gogolin*, 45 Wn.App. 640, 643-44, 727 P.2d 683 (1986), accord *State v. Pottorf*, 138 Wn.App. 343, 348, 156 P.3d 955 (2007) (“A defendant asserting self-defense is ordinarily required to admit an assault occurred.”).

However in *Callahan*, this Court held that a defendant may support his request for self-defense instructions with evidence inconsistent with his own testimony. *Callahan*, 87 Wn.App. at 933, 943 P.2d 676 (permitting defendant’s self-defense claim where he denied intentionally aiming his gun or firing at the victim but victim testified that defendant aimed the gun at his head). In *Callahan*, this Court interpreted *Aleshire* as a case where the defendant lacked evidence in support of a necessary element of self-defense rather than evidence that the defendant committed the underlying act. *Callahan*, 87 Wn.App. at 931-32.

Recently in *Werner*, the Supreme Court reiterated that when there is evidence of self-defense even when there is other conflicting evidence, it is reversible error to refuse to give a self-defense instruction. *Werner*, 170 Wn.2d at 337-338.

Here, Mr. Matesa testified that Mr. Schoenbein repeatedly struck him. Mr. Schoenbein denied hitting Mr. Matesa but stated that he put up his arms to protect himself. Mr. Schoenbein's situation more closely resembles that in *Callahan* than *Aleshire* because, unlike *Aleshire*, both Callahan and Mr. Matesa admitted that the altercation occurred and had evidence supporting their self-defense claims even though the evidence was inconsistent with their own testimony. *Aleshire*, 89 Wn. 2d at 71; *Callahan*, 87 Wn.App. at 931-32. Thus, Mr. Schoenbein was entitled to argue that he acted in self-defense because he presented some evidence in support of the elements of self-defense. See *Walker*, 136 Wn.2d at 772-73 and *Callahan*, 87 Wn.App. at 933.

The trial court's refusal to give this instruction was reversible error.

2. THE TRIAL COURT'S IMPOSITION OF 365 DAYS IN JAIL FOR A FIRST OFFENSE, A MINOR ASSAULT IN THE FOURTH DEGREE IN "CRUEL" AND VIOLATES ARTICLE ONE, SECTION 14 OF THE WASHINGTON STATE CONSTITUTION.

Mr. Schoenbein was sentenced to 365 days in jail for his first

criminal offense: assault in the fourth degree. CP 87-91. Mr. Matesa thought he was punched in the chest. RP 805. Fourth degree assault is an assault that does not amount to custodial assault or first, second, or third degree assault. RCW 9A.36.041.

Mr. Schoenbein's sentence is "cruel" under the state constitution article 1, section 14 which prohibits the imposition of cruel punishment. *State v. Morin*, 100 Wn. App. 25, 29, 995 P.2d 113, *review denied*, 142 Wn.2d 1010 (2000). Const. art. 1, section 14 provides: "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." *Id.*

Const. art. 1, s 14 provides greater protection than the Eight Amendment because a "cruel" sentence alone rather than a "cruel and unusual" sentence violates this provision. *Morin*, 100 Wn.App. at 29; *State v. Fain*, 94 Wn.2d 387, 392, 617 P.2d 720 (1980), citing, *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 615 P.2d 440 (1980).

A sentence violates the Washington Constitution if it is grossly disproportionate to the crime for which it is imposed. *Morin*, 100 Wn.App. at 29. In determining disproportionality, the court considers "(1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would have received in other jurisdictions; and

(4) the punishment imposed for other offenses in the same jurisdiction.”
Coker v. Georgia, 433 U.S. 584, 591-92, 97 S.Ct. 2861, 2865-2866, 53
L.Ed.2d 982 (1977); *Fain*, 94 Wn.2d at 397.

The question here is whether, after consideration of these factors, a sentence of 365 days for a first offense, a misdemeanor assault in the fourth degree, is grossly disproportionate to the crime here, committed by punching or pushing someone and causing a bruise on the chest.

The first factor, in the *Coker – Fain* analysis is the (1) the nature of the offense. Here, a misdemeanor assault, that caused no permanent, grievous or serious injury, just a bruise on the chest. RCW 9A.36.041 *and* RCW 9A.36.031. The jury rejected the prosecutor’s proposition that Mr. Schoenbein caused Mr. Matesa to lose his eye. RP 1306; CP 74-75. Given the minor nature of the offense, the one year jail term is disproportionate.

The second factor, the legislative purpose behind the statute indicates that under RCW 9A.04.020(1)(d) proportionality requires that minor offenses receive minor terms of punishment. RCW 9A.04.020(1)(d) provides:

(1) The general purposes of the provisions governing the definition of offenses are:

(d) To differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.

RCW 9A.04.020(1)(d).

With an offender score of zero and a seriousness level of II, if Mr. Schoenbein had been convicted of assault in the third degree, a more serious offense (level III) than assault in the fourth degree, his standard range sentence would have been zero to three months. RCW 9.94A.510.515. The Washington state courts have rejected a proportionality analysis based on this comparison under the Eighth Amendment and the Equal Protection clause, but not under article 1 section 14. *State v. Bowen*, 51 Wn. App. 42, 46-48, 751 P.2d 1226 (1988). Under article 1, section 14, Mr. Schoenbein's misdemeanor sentence does not differentiate on reasonable grounds his one year misdemeanor sentence when compared to a felony assault.

In Mr. Schoenbein's case, the relevant purpose of the fourth degree assault statute prohibits offensive touching, regardless of whether physical harm results. *State v. Davis*, 60 Wn.App. 813, 808 P.2d 167, review granted 118 Wn.2d 1027, 828 P.2d 564, affirmed 119 Wn.2d 657, 835 P.2d 1039, reconsideration denied (1991). RCW 9A.36.041. Assault in the fourth degree provides:

(1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

(2) Assault in the fourth degree is a gross misdemeanor.

Assault in the first degree requires grievous bodily injury. RCW 9A.36.011(1)(c).

A one year sentence is not proportionate to the legislative purpose of preventing minor but unwanted physical contact.

The third factor, (3) the punishment the defendant would have received in other jurisdictions reveals that in California under California Penal Code 242 "assault" is a misdemeanor not a gross misdemeanor. It is defined as "You willingly used force or violence upon another". Id. If convicted of the analogous assault in the fourth degree in California, the defendant faces lesser penalties:

- California misdemeanor probation (otherwise known as "summary" or informal probation), which is typically imposed for up to three years,
- up to six months in the county jail,
- a maximum fine of \$2,000,
- successful completion of a batterer's program, and/or
- community service.

The penalties under the RCW are considerably higher including a

maximum one year jail term and a \$5000 fine.

The fourth and final factor, (4) the punishment imposed for other offenses in the same jurisdiction reveals that the judge may impose up to one year for this misdemeanor assault, but only zero to three months for an assault in the third degree. RCW 9A.36.031; RCW 9.94A.510; *Bowen*, 51 Wn.App. at 45, 48.

When considering all of the *Coker*, factors applied to Mr. Schoenbein's case, it is evident that the imposition of the one year sentence is "cruel" and prohibited under article 1 section 14. Mr. Schoenbein respectfully requests this Court vacate his one year sentence and remand for credit for time served.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING SCHOENBEIN TO ONE YEAR IN JAIL FOR AN ASSAULT IN THE FOURTH DEGREE GROSS MISDEMEANOR THAT WAS A FIRST CRIMINAL CONVICTION.

Appellate courts have the authority to review the imposition of a sentence to determine if there has been an abuse of discretion. *State v. Smith*, 93 Wn.2d 329, 353, 610 P.2d 869 (1980); *State v. Derefield*, 5 Wn. app. 798, 799, 491 P.2d 694 (1971). Discretion is abused if a decision is manifestly unreasonable or "rests on facts unsupported in the record or

was reached by applying the wrong legal standard.” *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010); *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

In *Madsen*, the Supreme Court reversed the trial court’s denial of the defendant’s unequivocal motion to proceed pro se as an abuse of discretion. The Court’s ruling on abuse of discretion noted that discretion was abused for refusing to grant the unequivocal motion and for articulating improper reasons for the denial. *Madsen*, 168 Wn.2d at 507.

In *Derefield*, the trial court, in reliance on a probation report, rejected probation. The Court of Appeals affirmed holding that the record was sufficient to uphold year in jail where it demonstrated that defendant had a violent temper, an alcohol problem, and a preoccupation with firearms. *Derefield*, 5 Wn. App. at 800-802.

In *Smith*, the Supreme Court upheld lengthy jail sentences for possession of marijuana where the trial judge believed that the defendants were engaged in larger drug activity. The trial court “imposed jail sentences because he believed that a fine alone would not deter further violations.” *Smith*, 93 Wn.2d at 353. The Supreme Court held that the trial court did not abuse its discretion imposing the sentences based on trial court’s articulated “considerations”. *Id.*

Mr. Schoenfield's case is distinguishable from *Smith* and *Derefield* on several grounds. First, in the instant case, the trial judge's reasons for imposition of the 365 days were based on improper consideration of the assault in the first degree, the crime that the jury found Mr. Schoenbein did not commit. CP 74-75.

To impose the 365 days, the trial court perseverated on guessing at the jury's reasons for finding Mr. Schoenbein not guilty of assault in the first degree. The trial court ultimately convinced itself that Mr. Schoenbein either intended to assault Mr. Matesa but not cause grievous bodily injury, or Mr. Schoenbein intended to cause the injury but did not commit the assault. RP 1388-1390, 1345. The jury however rejected the assault in the first degree by acquitting Mr. Schoenbein of this charge. It was improper for the judge to assume Mr. Schoenbein responsible for the assault in the first degree injury and impose a sentence for that injury when the jury acquitted Mr. Schoenbein of this charge. RP 1345.

Second, no reasonable person would impose such a lengthy sentence based on a defendant with no criminal record and a conviction for causing a bruise.

Mr. Schoenfield's case is more like *Madsen*. In *Madsen*, the judge ignored the rights of the defendant relying instead on his personal beliefs

about Madsen proceeding pro se. In Mr. Schoenbein's case, the judge ignored the jury and imposed his opinion about the facts of the case to justify a 365 day sentence. This was an abuse of discretion because no reasonable judge would have attempted to second guess the jury, and disregard the jury verdict to impose a sentence for injuries not caused by the defendant.

4. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT ORDERED RESTITUION FOR INJURIES WHICH DID NOT RESULT FROM THE ASSAULT IN THE FOURTH DEGREE CONVICTION.

The trial court was not authorized to impose \$12,509.57 in restitution for injuries resulting from the crime of assault in the first degree when Mr. Schoenbein was only convicted of fourth degree assault. Supp. CP (Order of Restitution June 10, 2011).

The authority to impose restitution is not an inherent power of the court but is derived from statute. *State v. Davison*, 116 Wn .2d 917, 919, 809 P.2d 1374 (1991). An Appellate court must vacate a restitution order if the state failed to establish a causal connection between the defendant's crime and the damages. *State v. Blanchfield*, 126 Wn. App. 235, 108 P.3d 173 (2005); *State v. Woods*, 90 Wn.App. 904, 907, 953 P.2d 834 (1998).

Generally, a causal connection exists when, 'but for' the offense the defendant is found to have committed, the victim's loss or damages would not have occurred. *State v. Hahn*, 100 Wn.App. 391, 399, 996 P.2d 1125, *review granted*, 141 Wn.2d 1025 (dismissed Nov. 30, 2000) (2000). In determining whether a causal connection exists, the trial court must look "to the underlying facts of the charged offense, not the name of the crime to which the defendant entered a plea." *State v. Landrum*, 66 Wn.App. 791, 799, 832 P.2d 1359 (1992).

The restitution statute, RCW 9.94A.753 confers broad power on the trial court to order restitution. Restitution is allowed only for losses that are causally connected to a crime, and may not be imposed for a general scheme, acts connected with the crime charged, or uncharged crimes unless the defendant enters into an express agreement to pay restitution in the case of uncharged crimes. *State v. Kinneman*, 155 Wash.2d 272, 119 P.3d 350 (2005); *State v. Blanchfield*, 126 Wn. App. 235, 108 P.3d 173 (2005); *Woods*, 90 Wn.App. at 907.

a. Standard of Review

The scope of a court's statutory authority to impose

restitution is a legal question that the appellate court reviews de novo. *Kinneman*, 155 Wn.2d at 286; *State v. Johnson*, 96 Wn.App. 813, 815-16, 981 P.2d 25 (1999).

First, the Court considers whether the sentencing court applied the proper law, including the requirement that there be a causal connection between the crime proven and the victims' damages. Second, the Court reviews whether the application of that law to the evidence before the trial court supports findings of fact necessary to support the causal connection and the amount of the victim's damages. *Kinneman*, 122 Wn.App. at 857. Third, and finally the Court must determine whether the trial court abused its discretion by requiring the defendant to pay restitution in the amount and under terms contained in its order. *Davidson*, 116 Wn.2d at 919. Application of the wrong legal standard can constitute an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 166 P.2d 1167 (2006)

b. Victim's Injuries Must be Caused
By Crime Committed

In *Woods*, this court reversed a restitution order against Wood who was only convicted of possessing a stolen truck, but was charged with restitution for the belongings that had been in the

truck when it was stolen. *Woods*, 90 Wn.App. at 909-10, This Court held, “it cannot be said that ‘but for’ Woods’s possession of the stolen vehicle in September, the owner would not have lost the personal property located in the vehicle when it was stolen in August.” *Woods*, 90 Wn.App. at 909-10.

In *Blanchfield*, the trial court imposed restitution for a hotel visit and moving expenses that were planned before the assault. This Court reversed the order of restitution holding that “[w]ithout the required causal connection, the trial court lacked the statutory authority to award restitution for those expenses and losses.” *Blanchfield*, 126 at 242.

These cases illustrate that without a causal connection between the assault in the fourth degree and the restitution for the eye injury, the trial court did not have the authority to impose over \$12,000 in restitution. As in *Blanchfield* and *Woods*, this Court must vacate the order of restitution because Mr. Schoenbein can only be held liable for restitution causally connected to the assault in the fourth degree conviction, arguable a bruise.

D. CONCLUSION

Mr. Schoenbein respectfully requests this Court reverse his

conviction and the order of restitution and remand for a new trial and vacate his sentence.

DATED this 15th day of September 2011.

Respectfully submitted,

[Handwritten signature]

LISE
ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served Troy D. Schoenbein Pierce County Jail 910 Tacoma Ave S Tacoma, WA 98402 and the Pierce County Prosecutor's Office, pcpatcecf@co.pierce.wa.us

a true copy of the document to which this certificate is affixed, on September 15, 2011. Service was made electronically to the prosecutor and to Mr. Schoenbein by depositing in the mails of the United States of America, properly stamped and addressed.

[Handwritten signature]

Signature

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Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Amended Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Lise Ellner - Email: liseellner@hotmail.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us