

34841-5-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

EMANUEL A. PANTELEON,

Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF WALLA WALLA COUNTY

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RESPONDENT'S BRIEF

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Respectfully submitted:



by: Teresa Chen, WSBA 31762  
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## **I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

## **II. RELIEF REQUESTED**

Respondent asserts no error occurred in the conviction and sentence of the Appellant.

## **III. ISSUE**

Did the trial court abuse its discretion in imposing restitution where the Defendant's charged crime (assault with a firearm) caused the victim's gunshot injuries and where the crime of conviction (assault in the second degree) set in motion the events which resulted in the injury?

## **IV. STATEMENT OF THE CASE**

The Defendant Emmanuel Pantaleon was charged with murder in the first degree of Juan Martinez, assault in the first degree of Andres Solis, and intimidating a witness (Mr. Solis). CP 1-2.

By motion, the Defendant challenged the evidence of mens rea for counts one and two. CP 83-87. The Defendant acknowledged that, per

the police reports, he and his group met and travelled together to the Green Lantern Tavern. CP 84. They were caught on video following the victims Martinez and Solis from the Green Lantern Tavern into a parking lot. CP 84. The Defendant called Solis a rat, and hit him before Solis could enter his vehicle, and they fought. CP 84. Martinez attempted to intervene to help Solis. CP 84. Codefendant Arroyo began to fight with Martinez. CP 84-85. Martinez was shot in the melee, and he died. CP 85. Arroyo then shot Solis three times in the leg, buttocks, hand, and chest. CP 37, 84. Arroyo was heard yelling that the shooting of Martinez was a mistake. CP 85. The Defendant's group then fled. CP 85.

The State's responsive memo (CP 88-113) explained that there was reason to believe there was a standing order to 18<sup>th</sup> Street Gang members to kill Andres Solis for cooperating with police. CP 93. Arroyo intended to kill Solis, and for that purpose he brought a firearm when he went out that night. CP 92-93. The Defendant would have reason to know this. The Defendant's group gathered in another location before going to the tavern where they found Solis and trailed him to the parking lot. CP 92-94. The Defendant was the first person to physically engage with Solis. CP 84. Solis was shot multiple times. CP 94. The Defendant's assault of Solis during the shooting increased the severity of Solis' injury and

prevented Solis from escaping the gunshots. CP 94. Martinez was not the intended target, but under the doctrine of transferred intent the premeditation transferred. CP 91-92, 94. The Defendant expressed no surprise or concern at the culmination of events, suggesting “a conformity of intent.” CP 93.

The Defendant eventually pled guilty to the amended information: second degree assault of Mr. Solis and intimidating a witness (Mr. Solis). CP 4-17; RP 3-10. The Defendant made an Alford plea, agreeing to incorporation of the police reports (CP 75-79, 96-113) and probable cause statement (CP 80-82). CP 14; RP 9.

At the restitution hearing, the Defendant objected to restitution related to Mr. Solis, because the Defendant was not the actual shooter. CP 62; RP 31-35. The court noted that under the preponderance of the evidence standard, looking to mere causation, the Defendant set in motion a process that caused the injury. RP 36-37. The court ordered restitution joint and several with the co-defendants. CP 65-66.

## V. ARGUMENT

- A. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING RESTITUTION WHERE THE DEFENDANT CAUSED THE VICTIM'S INJURIES.

The Defendant challenges the imposition of restitution, claiming Mr. Solis' injuries were not causally connected to "his own conduct." Appellant's Brief (AB) at 6.

A trial court's imposition of restitution is reviewed for an abuse of discretion. *See State v. Enstone*, 137 Wash.2d 675, 679, 974 P.2d 828 (1999) (foreseeability rejected as part of causal connection requirement of RCW 9.94A.142). An abuse of discretion occurs when the trial court's decision is " 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' " *Id.* at 679–80, 974 P.2d 828 (quoting *State v. Blight*, 89 Wash.2d 38, 41, 569 P.2d 1129 (1977)).

*State v. Wilson*, 100 Wn. App. 44, 47, 995 P.2d 1260, 1262 (2000).

The power to impose restitution derives entirely from the statute.

*State v. McCarthy*, 178 Wn. App. 290, 294, 313 P.3d 1247 (2013).

Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person ...

RCW 9.94A.753(5).

The Legislature has expressed a strong desire that offenders must pay restitution to the victims of their crimes. Statutes authorizing restitution should not be given "an overly technical construction which would permit the defendant to escape from just punishment." *State v. Davison*, 116

Wash.2d 917, 922, 809 P.2d 1374 (1991); *State v. Mead*, 67 Wash.App. 486, 490, 836 P.2d 257 (1992). Restitution statutes must instead be construed broadly so as to carry out the expressed intent of the Legislature. *State v. Davison*, at 920, 809 P.2d 1374 (“The very language of the restitution statutes indicates legislative intent to grant broad powers of restitution.”).

*State v. Johnson*, 69 Wn. App. 189, 193, 847 P.2d 960, 962 (1993).

As the Defendant has explained, the loss must be causally connected to the charged crime, meaning that the loss would not have occurred “but for” the crime. AB at 5 (citing *State v. Griffith*, 164 Wn.2d 960, 966, 195 P.3d 506 (2008); *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007); *State v. Kinneman*, 155 Wn.2d 272, 286, 119 P.3d 350 (2005); *State v. Acevedo*, 159 Wn. App. 221, 229, 248 P.3d 526 (2010)). Foreseeability is not required. *State v. Tobin*, 161 Wn.2d at 524 (citing *State v. Enstone*, 137 Wn. 2d 675, 682-83, 974 P.2d 828 (1999)).

Here, but for the Defendant assaulting Mr. Solis and holding him for Mr. Arroyo, Mr. Solis would have succeeded in getting into his car and would not have been injured.

The Defendant cannot claim that his crime was an assault in the fourth degree. First, he pled guilty to an assault in the second degree. CP 6. Second, “[i]n determining whether a causal connection exists, we 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) (imposing restitution for medical examination and counseling for sexual assault where defendant pleaded guilty to reduced charge of fourth degree assault). Here the charged offense was assault in the first degree, i.e. assault with a firearm. CP 1-2.

The Defendant points to a few select cases where restitution was not imposed for injuries which occurred subsequent and not related to the charged crime. AB at 6. This is proper as there is no causal connection. It is also permitted under the statute. RCW 9.94A.753(5) (the court may decline to impose restitution only if “extraordinary circumstances exist which make restitution inappropriate”).

However, there are also a number of cases finding a sufficient causal connection even under attenuated circumstances. A defendant convicted of solicitation of arson could be made to pay restitution for the consequences of the fire that **someone else** set. *State v. Clapp*, 67 Wn. App. 263, 834 P.2d 1101 (1992). A juvenile defendant who stole and then abandoned a car could be ordered to pay restitution for damage committed **by a third party**. *State v. Steward*, 52 Wn.App. 413, 760 P.2d 939 (1988). Restitution can include the attorney fees in a civil suit necessary to recover the money stolen by the offender. *State v. Christensen*, 100

Wn.App. 534, 997 P.2d 1010 (2000); *State v. Kinneman*, 155 Wn.2d 272, 286–89, 119 P.3d 350, 357–59 (2005). It can include the costs of unloading, loading, and resetting bank surveillance cameras after a burglary. *State v. Smith*, 119 Wn.2d 385, 831 P.2d 1082 (1992). It can include the cost of reviewing business records to assess the loss from embezzlement. *State v. Johnson*, 69 Wn. App. 189, 192, 847 P.2d 960 (1993). And costs incurred in finding and returning a child victim of custodial interference can be recovered in restitution as being “reasonably and rationally related to the crime.” *State v. Tobin*, 161 Wn.2d at 525.

Notwithstanding the claim that growing marijuana is a “victimless” crime, restitution was upheld for the costs of repairing the house used. *State v. Coe*, 86 Wn. App. 841, 843, 939 P.2d 715, 716 (1997). The dry-rot, mold, and mildew damage would not have occurred but for the illegal grow operation. *State v. Coe*, 86 Wn. App. at 844.

When a driver with a suspended license got in a fatal accident, restitution covered the decedent’s burial costs. *State v. Harris*, 181 Wn. App. 969, 974, 327 P.3d 1276, 1279 (2014). Although driving with a suspended license is not an offense that normally would result in loss of money or property, and the driver may have been driving carefully, “under the plain language of the statute, that is not the issue.” *State v. Harris*, 181

Wn. App. at 974-76. The “but for” test in Washington is a lesser standard than “proximate cause.” *State v. Harris*, 181 Wn. App. at 975.

The Defendant relies upon *State v. Hartwell*, 38 Wn. App. 135, 684 P.2d 778 (1984). AB at 6. The *Harris* case distinguished *Hartwell* explaining that there that victim’s injuries were sustained **before** the defendant’s flight, i.e. the hit-and-run, and therefore the injuries were not caused by the crime.

In *Hartwell*, the defendant was convicted of hit-and-run and was ordered to pay restitution for the victims’ injuries as part of his sentence for that conviction. We reversed, reasoning that leaving the scene of the accident was the precise event underlying the offense of hit-and-run. Because the victim’s injuries were sustained before the defendant committed the offense, the offense did not cause them. We said, “Had Hartwell stayed at the scene, thereby not committing the offense, the injuries presumably would have been the same.” *Hartwell*, 38 Wash.App. at 140, 684 P.2d 778. Harris argues that, given the absence of evidence that he was driving in an unsafe manner, Grayson presumably would have died even if he had been driving with a valid license and therefore under *Hartwell* there was no causation.

Whether or not Harris was driving carefully is immaterial to deciding whether or not his criminal conduct was a “but for” cause of the loss. Unlike in *Hartwell*, the criminal act by Harris for which he was ordered to pay restitution was driving with a suspended license, not leaving the scene of the accident. It was his criminal act of driving when prohibited from doing so, not the status of having a suspended license, that caused the loss. On the night of the accident, Harris should not have been driving at all. It was his decision to drive illegally that placed him

behind the wheel on East Marginal Way at the time and place Grayson was attempting to cross.

*State v. Harris*, 181 Wn. App. at 976.

Likewise, in the instant case, the victim's injuries were not sustained before the assault. Rather the injuries were a result of a joint, cooperative assault. The Defendant engaged Mr. Solis in order to facilitate Arroyo's shooting. But for his waylaying and abetting, Mr. Solis would not have been injured. This has been proven by a preponderance of the evidence, and the court's finding in this regard is reasonable and tenable. The restitution order should be affirmed.

**B. INDIGENCY FOR PURPOSES OF APPOINTMENT OF COUNSEL ON APPEAL IS NOT DETERMINATIVE OF ASSESSMENT OF APPELLATE COSTS.**

In the Defendant's Conclusion paragraph, he states that due to his indigent status, "he should not be assessed appellate costs if the State were to substantially prevail." AB at 8. Indigency for purposes of appointment of counsel on appeal is neither a bar to the assessment of appellate costs nor is it the legal standard. Rather the Defendant must prove to the commissioner or clerk that he "does not have the current or likely future ability to pay such costs." RAP 14.2. No showing is made in the

Appellant's Brief. The Defendant was 24 at the time of his plea and received a sentence of approximately two years. CP 6, 22. At sentencing, defense counsel described her client as employable with work history at Smith Frozen Foods. RP 14. He has the ability to pay.

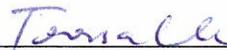
In that same Conclusion paragraph, the Defendant states that a Continued Indigency report will be filed. AB at 8. It has not yet been filed. The State reserves the right to respond to any challenge to costs that arises from any later filing.

## **VI. CONCLUSION**

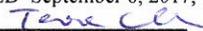
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and sentence.

DATED: September 6, 2017.

Respectfully submitted:

  
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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED September 6, 2017, Pasco, WA  
  
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