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Division III  
State of Washington  
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No. 35637-0-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT,

v.

BRENNAN THOMAS PLATT,

APPELLANT.

BRIEF OF RESPONDENT

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David B. Trefry, WSBA #28345  
Senior Deputy Prosecuting Attorney  
Attorney for Respondent

JOSEPH BRUSIC  
Yakima County Prosecuting Attorney  
128 N. 2d St. Rm. 329  
Yakima, WA 989

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## I. ASSIGNMENTS OF ERROR

### ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

#### A. ISSUES PRESENTED BY ASSIGNMENT OF ERROR.

1. The trial court lacked authority to impose restitution without first holding a restitution hearing.
2. Appeal costs should not be awarded.

#### B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. Platt agreed to the payment of restitution, he did not object to the imposition of the “placeholder” amount, even if this was error it would be invited error based on Platt’s actions at sentencing.
2. While the record demonstrates that pursuant to Blazina Platt has the ability to pay costs, restitution and the cost of this appeal when the State prevails, the State, by and through the Yakima County Prosecutor’s Office shall not be asking for costs upon prevailing in this appeal. Because there was no breach the defendant does not have a choice of remedies. Further, if this court does follow James, infra, the remedy will be a hearing to allow the State to prove the defendant, not the State, was in breach.

## II. STATEMENT OF THE CASE

The facts that pertain to this appeal can all be found in the sentencing portion of this trial which can be found at RP 707-86. The appellant has set out the facts and procedure sufficiently. Therefore, pursuant to RAP 10.3(b); the State shall not set forth a separate fact section. The State shall refer to specific sections of the record in this brief as needed.

## III. ARGUMENT

**1. The defendant agreed that there was going to be restitution imposed, his trial counsel reviewed the judgment and sentence in detail and did not object to the imposition of restitution; any claimed error before this court is invited**

**error.**

A trial court's determination of restitution is reviewed for an abuse of discretion. State v. King, 113 Wn. App. 243, 299, 54 P.3d 1218 (2002). Whenever an offender is convicted of an offense which results in injury to any person or damage to or loss of property, restitution shall be ordered. RCW 9.94A.753(5). The trial court can determine restitution by either relying on the defendant's stipulation to the amount or by determining an amount based on a preponderance of the evidence. State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005), abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

“However, the amount of harm or loss "need not be established with specific accuracy." Evidence supporting restitution " 'is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.' "...To determine the amount of restitution, the trial court can either rely on a defendant's acknowledgment or it can determine the amount by a preponderance of evidence.”

Id at 154 (Citations omitted.)

The amount of restitution should be based on "easily ascertainable damages"; however, specific accuracy does not need to be established. Hughes, 154 Wn.2d at 154 (quoting RCW 9.94A.753(3)).

If a defendant disputes the relevant facts needed to determine restitution, an "evidentiary hearing" is needed at which the State must prove the amount by a

preponderance of the evidence. Hughes, 154 Wn.2d at 154. It is noteworthy that this statute does not state “if the defendant disputes imposition of restitution” it is objection to or dispute of the value not the actual imposition.

State v. McCarthy, 178 Wn.App. 290, 295-6, 313 P.3d 1247 (2013) does an excellent job of addressing the rationale and purpose of RCW 9.94A.753:

One goal of restitution is to require the defendant to face the consequences of his conduct. The statute is designed to promote respect for the law by providing punishment that is just. Restitution is both punitive and compensatory in nature.

The Supreme Court twice has impliedly rejected an argument that the restitution statute must be construed in favor of the defendant because the statute is punitive in nature. Instead, in Davison, the court mentioned that "[t]he very language of the restitution statutes indicates legislative intent to grant broad powers of restitution." We will not give the statute an overly technical construction that would permit the defendant to escape from just punishment.

(Citation omitted.)

According to RCW 9.94A.753(5), because Platt was convicted of vehicular assault and caused damage to the victim, he was required to pay restitution to the victim.

The State was on the record from the beginning of this hearing that restitution would be required “Also, your Honor, I don’t think -- what was not mentioned by -- Hayla, that she did mention to me, is that although there are no surgeries currently scheduled in the future, it is uncertain whether there will be additional surgeries, and I’m at this time asking for restitution of \$1 as a placeholder for restitution in this matter. RP 729

This was not something that was a surprise to Platt, he states at sentencing “I understand money has always been something that has been a concern or an issue, and -- the efforts I have made weren’t as great as they could have or should have been, to help her resolve her expenses and her bills. And I am sorry to them directly for that. RP 762.

This obligation was something that Platt accepted even before criminal charges were filed. Platt testified at the sentencing “I was able to pay Hayla through Mr. Smith’s office was not because it became a legal thing and I’m going to step up so that I don’t have to (inaudible) legal trouble; it’s that I’ve been able to make small increment payments in little bits at a time and -- through Mr. Smith’s office we were able to come up with greater sums of payments on a more regular basis, which was, I thought, was helpful to Hayla. RP 763.

To now come before this court claiming error is the very definition of invited error. In Young, Young’s attorney also acknowledge the restitution obligation the court stated in State v. Young, 63 Wn.App. 324, 818 P.2d 1375 (1991) “Young is not entitled to raise the argument. The doctrine of invited error prohibits a party from setting up error in the trial court and then complaining of it on appeal. State v. Henderson, 114 Wash.2d 867, 870, 792 P.2d 514 (1990); State v. Young, 48 Wn.App. 406, 414-15, 739 P.2d 1170 (1987).”

In State v. Stoddard, 192 Wn.App. 222, 225, 366 P.3d 474 (Div. 3 2016) this court agreed with the State’s argument in this case, stating “Gary Stoddard agreed to the restitution amount. Thus, the invited error doctrine precludes review

of the restitution judgment. See State v. Young, 63 Wn.App. 324, 330, 818 P.2d 1375 (1991). In State v. Young, this court held that the doctrine of invited error precluded the defendant from raising an argument on appeal that the restitution order requiring him to pay a homicide victim's child support obligation was not authorized by statute, when defendant agreed to restitution amount.”

Platt never challenged the imposition or the amount of the restitution at the sentencing hearing. The hearing was lengthy and detailed because Platt had requested that he receive a downward departure, a mitigated sentence. Extensive briefing was done by Platt and nowhere in that briefing does Platt state any disagreement with the imposition of restitution. CP 568-74

Platt clearly understood that he was going to have to pay restitution. His attorney acknowledges this obligation at this hearing “He is working, hopes to continue. Obviously, he will have some -- he will have some restitution. What that is has not been determined at this point in time.” RP 757 This clearly is not an indication that he disputed the imposition of restitution. If Platt was disputing the imposition of restitution, he is required to state that on the record. Hughes, supra. He cannot stand silent or as here, actually acknowledge that restitution will be imposed and then lay in wait until his appeal to attempt to remove this obligation from his judgment and sentence.

There were numerous times where Platt could have, if he truly intended to, disputed the assessment of restitution, he never stated a single objection. The trial court discussed the implication of “Blazina” and Platt’s ability to pay his

obligation, there was not mention of disputing restitution or for that matter any other cost. “Mr. Platt, the Supreme Court has required in a case called Blazina that I go over your – financial situation with you, and I’m going to do that at this time.” RP 764-5

The trial court did not abuse its discretion by requiring Platt to pay restitution, nor was it an abuse of discretion to impose this “placeholder” amount, to insure that the rights of the victim were protected.

One of, if not the most important section of the sentencing hearing, is the section where that court stated the reasoning and thought process for the imposition of an exceptional sentence downward. The court determined that Platt should receive this exceptional sentence downward with a very specific alternative to full time incarceration.

In the initial analysis as to why the court felt that this was a fitting sentence and why it worked to the benefit of both Platt and the victim the court made the following statement:

That leads me to what type of sentence below the standard range is appropriate. I am going to sentence Mr. Platt to two days of confinement and 88 days of home detention. During home detention Mr. Platt will be staying with his parents, he will not be -- he must remain in his residence 24 hours a day; **the only exception is when he goes to work.**

**And one of the reasons that I believe that this is appropriate is because I am going to order a \$1 placeholder in the restitution. I think that part of my thought process is, Mr. Platt needs to be working so he can address the situation that he has coming with his legal/financial -- obligations, which include restitution.**

So, I will be entering an order on home detention. I do not believe any further community custody is warranted beyond that. I am not going to order that. So now I'm going to talk about the legal/financial obligations that I'm going to impose. (Emphasis added.)  
RP 773-4

Once again Platt did not state any objection to the imposition of “placeholder” amount nor did he request a hearing.

It must be noted that the section of the judgment and sentence which shows the one-dollar amount states in full “Restitution distributed to Hayla Eder-Cadden subject to modification...” CP 585

State v. Branch, 129 Wn.2d 635, 919 P.2d 1228 (Wash. 1996) “Branch's failure to raise this issue at the trial court and his agreement to pay restitution waives his right to argue the sufficiency of the record on appeal. See State v. Young, 63 Wn.App. 324, 330, 818 P.2d 1375 (1991) (on appeal, defendant cannot challenge child support as part of restitution order when he agreed to pay child support as part of criminal restitution); State v. Harrington, 56 Wn.App. 176, 181, 782 P.2d 1101 (1989) (failure to object to amount of restitution order at trial precluded review on appeal). We affirm the award of restitution in the amount of \$398,652.91.”

Here it is immaterial what the amount entered was, that entry of an “order”, agreed to and not ever objected to, preserves this obligation. If at a later date there are more costs that are to be imposed, Platt may have the right to dispute the amount, but he agreed to the original order therefore he would not have the right to challenge the order requiring that he make restitution payments.

(The State has recently received notice that there were in fact additional costs incurred.)

If this court were to determine that the original order is invalid the victim and the State may still be made whole. The period for entry may only be 180 days for the method presently before this court RCW 9.94A.753(7) allows far longer period to enter such an order:

(7) Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order. (Emphasis added.)

This court may also address this claim as required by RAP 2.5(a)(3) which provides that "**manifest** error affecting a constitutional right" may be raised for the first time on appeal. (Emphasis added.) Walsh goes on to state, "'Manifest" in RAP 2.5(a)(3) means that a showing of actual prejudice is made. State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed. State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)."

The alleged error raised by Platt is not manifest and is not likely to

succeed. Clearly Platt agreed to this obligation, there was no chance for the trial court of the State to address any alleged concerns, because Platt agreed that he was required to pay.

**Response to Allegation regarding appellate costs.**

The State has indicated in more cases than it would ever care to count that this court's ruling in State v. Sinclair, 192 Wn.App. 380, 385-86, 388-90, 367 P.3d 612 (quoting RAP 14.2), review denied 185 Wn.2d 1034 (2016) allows for the awarding of costs to the primary prevailing party on appeal.

Specifically, this court opined: "The commissioner or clerk "will' award costs to the State if the State is the substantially prevailing party on review, 'unless the appellate court directs otherwise in its decision terminating review. "... When a party raises the issue in its brief, we will exercise our discretion to decide if costs are appropriate.... We base our decision on factors the parties set forth in their briefs rather than remanding to the trial court."

The State, by and through the Yakima County Prosecutors Office continues to assert the right to request these costs on a case by case basis when and if it deems it appropriate

**However**, as Yakima County has also indicated in each and every appeal were this issue has been raised, in the interests of justice and judicial economy the State shall not be requesting appellate costs in this case.

**IV. CONCLUSION**

Platt agreed to pay restitution. Both trial counsel for Platt and Platt himself

addressed their understanding that restitution was going to be imposed. If Platt had a dispute with the actions of the trial court in the imposition of restitution or in the amount imposed, it was his obligation to raise that issue after which a hearing would have been required.

This court should uphold the actions of the trial court, this appeal should be denied.

Respectfully submitted this 13<sup>th</sup> day of July 2018,

s/ David B. Trefry  
DAVID B. TREFRY, WSBA #16050  
Deputy Prosecuting Attorney  
Yakima County, Washington  
P.O. Box 4846, Spokane WA 99220  
Telephone: (509) 534-3505  
David.Trefry@co.wa.yakima.us

DECLARATION OF SERVICE

I, David B. Trefry, state that on July 13, 2018, I emailed a copy of the Respondent's Brief to: Mrs. Susan Gasch at [gaschlaw@msn.net](mailto:gaschlaw@msn.net)

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13<sup>th</sup> day of July 2018 at Spokane, Washington.

s/ David B. Trefry  
DAVID B. TREFRY, WSBA #16050  
Deputy Prosecuting Attorney  
Yakima County, Washington  
P.O. Box 4846, Spokane WA 99220  
Telephone: (509) 534-3505  
David.Trefry@co.wa.yakima.us

**YAKIMA COUNTY PROSECUTORS OFFICE**

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