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NO. 35922-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS MARLIN,

Appellant.

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

The Honorable John O. Cooney, Judge

BRIEF OF APPELLANT

LUCIE R. BERNHEIM
KEVIN A. MARCH
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The state did not establish and the trial court did not make a finding that the March 18, 2016 assault was the “but-for” cause of Louis Dupuy’s continuing monthly medical appointments with his regular doctor for chronic illness and pain that he had experienced for years. The court’s restitution order for Mr. Dupuy’s out-of-pocket expenses and reimbursement to his insurance carrier for treatment received subsequent to the incident date therefore constituted an abuse of discretion and must be vacated.

2. The state did not establish by a preponderance of evidence that Mr. Dupuy’s insurance carrier suffered any loss as a result of the March 18, 2016 assault. The court’s restitution order for reimbursement to Mr. Dupuy’s insurance carrier therefore constituted abuse of discretion and must be vacated.

3. The \$200 criminal filing fee should be stricken from the judgment and sentence.

Issues Pertaining to Assignments of Error

1. A court may impose restitution only for losses that are causally connected to the crime of conviction. Losses are causally connected only if, but for the charged crime, the victim would not have suffered the loss. Mr. Dupuy saw Dr. Lahtinen on a monthly basis for years for chronic health problems and continued to do so after the March

18, 2016 assault. Did the state fail to establish that assault was the “but-for” cause of these appointments which continued after the incident, requiring that this portion of the court’s restitution order be vacated?

2. Where a person or entity has suffered a loss, a court can order a defendant convicted of a crime to pay restitution. Mr. Dupuy’s insurance carrier denied suffering a loss. Did the state fail to establish that the insurance carrier suffered any loss, requiring that the court’s restitution order as it pertains to reimbursement to the insurance carrier be vacated?

3. Under the Washington Supreme Court’s decision in State v. Ramirez, ___ Wn.2d ___, 426 P.3d 714 (2018), must the \$200 criminal filing fee be stricken based on Thomas Gerald Marlin’s indigency?

B. STATEMENT OF THE CASE

The state charged Thomas Marlin with one count of assault in the second degree after Mr. Marlin and Louis Dupuy had a physical altercation on March 18, 2016. CP 1.

At trial the state presented the testimony of Officer Justin Hobbes, Dr. Duncan Lahtinen, Dr. Williams Keyes, Mr. Dupuy, Desiree Rogers, and Laura Shumway. 1RP¹ 106-16; 11RP 117-40; 1RP 142-55; 1RP 158-226;

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP—consecutively paginated transcripts of January 16, 17, and 18, 2018 and March 7, 2018; 2RP—consecutively paginated transcripts of May 10, 2018 and June 1, 2018; and 3RP—consecutively paginated transcript of May 31, 2018.

1RP 228-40; 1RP 240-60. The defense presented the testimony of Tyger Marlin and the defendant, Mr. Marlin. 1RP 263-67; 1RP 267-87.

Mr. Dupuy testified that Mr. Marlin showed up at his home on March 18, 2016, demanding repayment of money that Mr. Dupuy had previously borrowed. 1RP 160. Mr. Dupuy testified that he asked Mr. Marlin to lower his voice and tried to escort him down his front steps by Marlin's elbow. 1RP 162. After he turned around back toward his front door, Mr. Dupuy testified that Mr. Marlin bear-hugged him, picking him up off of the ground and slamming him into a railing. 1RP 163. At that point, he testified, he heard a crack in his back. 1RP 163.

Dr. Lahtinen, Mr. Dupuy's primary care physician, testified that he saw Mr. Dupuy on March 18, 2016, the date of the assault, for a preexisting appointment. 1RP 118, 123. Dr. Lahtinen's report from the March 18, 2016 visit read:

Louis is a 48-year-old white male, comes in with ongoing problems, including arthritis, hypergonadism, ongoing fatigue, and concerned by the deterioration of his health so to speak. Today he decided to go out at home and apparently fell and hit the porch banister injuring his right pelvis and twisting his right shoulder. He has had some issue with these aspects in the past and is having pelvic pain at this particular point.

1RP 125.

Based on Mr. Dupuy's complaints, Dr. Lahtinen ordered x-rays of his pelvis, hip, and shoulder on March 18, 2016. 1RP 125-26. No "acute" injuries were observed, though the x-rays did show preexisting chronic conditions. 1RP 127. Dr. Lahtinen did not order further testing at that point because the fractures that were observed "would have healed either way" and he gave Mr. Dupuy his usual medications for pain. 1RP 127.

Mr. Dupuy returned to Dr. Lahtinen on March 21, 2016 for his x-ray follow-up appointment. 1RP 128. At this appointment, Mr. Dupuy also reported severe lower-back, shoulder, chest, and rib pain. 1RP 129. Dr. Lahtinen ordered additional x-rays of Mr. Dupuy's shoulder, rib, and spine in response to his patient's complaints. 1RP 131. On March 23, 2016, Mr. Dupuy returned again to discuss the results of the March 21, 2016 x-rays, which showed rib and spine fractures. 1RP 133. Mr. Dupuy reported additional abdomen and pelvis pain on March 23, 2016, so Dr. Lahtinen also ordered a CT scan of his abdomen and pelvis. 1RP 134-35. The x-rays and CT scan were referred to Inland Imaging. 1RP 143. The total cost billed to Mr. Dupuy for the x-rays and the CT scan performed in response to Mr. Dupuy's complaints of pain on March 18, 2016 through March 23, 2016 was \$109.94. CP 112. The total cost billed to Mr. Dupuy for his x-ray follow-up appointments on March 21, 2016 and March 23, 2016 was \$29.06. CP 108. The total cost billed to Mr. Dupuy's insurance carrier for the x-rays, CT

scan, and follow-up appointments on March 21, 2016 and March 23, 2016 was \$544.49. CP 108, 112. The Inland Imaging ledger also shows two “MRI JOINT UPR EXTREM W/O DYE (73221)” entries performed nearly two months later on May 16, 2016, but the relationship, if any, between those entries and the March 18, 2016 incident is unclear. CP 108.

When asked what treatment he would prescribe for Mr. Dupuy’s injuries, Dr. Lahtinen testified that the fractures observed should simply be allowed to heal for four to six weeks. 1RP 120. Dr. Lahtinen testified that he prescribed Mr. Dupuy’s usual medications for his chronic health problems. 1RP 128. He testified that Mr. Dupuy had been a patient of his for some time, and had a history of lower back pain, chronic neck pain, chronic pelvis pain, chronic lumbar issues, chronic shoulder pain, degenerative disk disease, joint derangement, and that Mr. Dupuy took medication for chronic pain. 1RP 136. He testified that Mr. Dupuy’s injuries did in fact heal and that he continued to see Mr. Dupuy as a patient “on other matters.” 1RP 120-21. Dr. Lahtinen repeated: Mr. Dupuy does “regular followups [sic] for other medical problems.” 1RP 137.

Mr. Dupuy, on the other hand, testified that he did not see Dr. Lahtinen on the date of the incident because the pain was too immense to get himself into a vehicle. 1RP 169-70; 208. He testified that when he did see Dr. Lahtinen he initially did not mention the incident with Mr. Marlin

because he wanted to give Mr. Marlin a chance to pay for his medical expenses. 1RP 170. He testified that he returned to see Dr. Lahtinen again after that and, having not heard from Mr. Marlin regarding payment, described the March 18, 2016 incident with Mr. Marlin to his doctor. 1RP 170. Mr. Dupuy testified that he received treatment for his injuries. 1RP 171. He was already on pain medications for reasons unrelated to the March 18, 2016 incident and there was no need for him to be on additional medication after the incident. 1RP 172. He testified that he still experiences pain from the incident. 1RP 172.

The jury did not reach a verdict as to the assault in the second degree charge, but convicted Mr. Marlin of the lesser-included assault in the fourth degree. CP 57-58. At sentencing, the state initially requested that \$2,445.00 total in restitution be paid to insurance for Mr. Dupuy's medical expenses and to Mr. Dupuy for his out-of-pocket costs spanning from March 18, 2016 to May 15, 2017. 1RP 366, 371. Mr. Marlin objected, arguing that subrogation was at this point inappropriate and that there were no reasonably ascertainable damages specifically resulting from any injury caused by the March 18, 2016 assault. 1RP 371.

In imposing its sentence, the court declined to address restitution without further information: "[T]his wasn't a type of crime where you caused damage to someone's property or stole someone's property and the damage

and the connection between the action and the damages are easily ascertainable.” 1RP 378. The court found a causal link between the assault and the fractures Mr. Dupuy sustained based on the testimony presented, but left the question of what if any expenses were associated with the treatment of that injury up to the state to attempt to prove at a future hearing. 1RP 379-81.

The court also imposed a \$500 crime victim compensation fund assessment and a \$200 criminal filing fee, and required that Mr. Marlin make \$25 monthly payments on these legal financial obligations. 1RP 379.

The state submitted its first restitution brief on May 3, 2018, requesting a different restitution amount of \$1,385.63. CP 104-12. In support of its request, the state presented a patient ledger showing Mr. Dupuy’s appointments at the Doctors Clinic of Spokane with dates of 3/18/16, 3/21/16, 3/23/16, and then monthly appointments following the incident: 4/20/16, 5/16/16, 6/14/16, 7/12/16, 8/9/16, 10/4/16, 11/28/16, and 12/16/16. CP 107-11. All of these visits were billed at the same rate: \$110. CP 107-11. Mr. Dupuy’s 10/4/16 visit also included a \$25 “office procedure,” but no further details were provided. CP 110. The state also presented a bill from Inland Imaging which detailed the costs of the x-rays and CT scan and two MRIs performed nearly two months after the incident, on May 16, 2016. CP 112.

On May 7, 2018, the state amended its restitution request to \$1,130.65, claiming Marlin should reimburse Medicare, Mr. Dupuy's insurance carrier, and Mr. Dupuy for treatment Mr. Dupuy received from March 18, 2016 through May 15, 2017. CP 113-15. On May 9, 2018, the state again amended its restitution request to \$1,123.48; \$181.02 owed to Mr. Dupuy (for reimbursement for his costs associated with care at the Doctors Clinic), \$157.67 owed to Inland Imaging, and \$784.79 owed to Medicare. CP 120. Along with its second corrected request, the state also filed a certificate of Cindy Hamamoto, a victim advocate assigned to the case. CP 121-22. In this certificate, Ms. Hamamoto claimed that Mr. Dupuy told her he was seeing doctors as a result of the attack. CP 121. Ms. Hamamoto swore under penalty of perjury that based on her conversations with Mr. Dupuy, all of the medical costs incurred from March 2016 to May 2017 were the result of the injuries inflicted by Marlin. CP 122.

The defense disputed that restitution should be ordered beyond the March 18, 2016—March 23, 2016 timeframe: the Doctors Clinic patient ledger did not establish by a preponderance of the evidence that the additional visits were causally connected to the assault. CP 116-19. Mr. Marlin agreed to reimburse Mr. Dupuy for expenses associated with his 3/18/16, 3/21/16, and 3/23/16 visits to the Doctors Clinic and services performed by Inland Imaging, though he disputed that the state had met its

burden as to these services as well. CP 117. Mr. Marlin pointed out that the costs associated with Inland Imaging x-rays and the CT scan amount to \$109.94, not \$157.67, and agreed to pay \$109.94. CP 118. The defense brief further disputed that anything should be paid out to insurance; more than two years after the incident, insurance reported that “nothing has been paid out”; in other words, there was no loss. CP 118-19. The brief attached copies of emails to Mr. Dupuy’s insurance carrier from Ms. Hamamoto, showing the carrier specifically advising the state that nothing had been paid out and no claims had been made. CP 153-63.

On May 30, 2018, the state submitted an updated restitution request reflecting additional payments made on behalf of Mr. Dupuy. CP 136-43. While the state requested a total of \$1,123.48 based on its calculations that \$236 was owing to Mr. Dupuy, \$157.67 was owing to Inland Imaging, and \$784.79 was owing to Medicare, those totals actually amount to \$1,178.46. The state also submitted a certificate signed by David Hillman, an employee in the billing department at the Doctors Clinic. CP 192. Mr. Hillman stated that all of Mr. Dupuy’s visits from March of 2016 to May of 2017 were related primarily to the March 18, 2016 assault, though other preexisting medical conditions were addressed. CP 192. The state presented no testimony and made no claim that but for the March 18, 2016 assault, the

appointments at the Doctors Clinic from March 2016 to May 2017 would not have occurred.

Testimony regarding restitution was presented on May 31, 2018, and argument held on June 1, 2018. 2RP 30. Mr. Dupuy testified that before March 18, 2016, he saw Dr. Lahtinen once a month for preexisting injuries and pain medication. 3RP 13. He further testified that these appointments continued after March 18, 2016 and that he would likely continue to see Dr. Lahtinen “until I die.” 3RP 14. Mr. Hillman, echoing the contents of his certificate, testified that the fourteen visits referenced in the patient ledger presented by the state were “primarily related” to the March 18, 2016 assault. 3RP 22. He also testified that Mr. Dupuy visited the Clinic more than the fourteen visits detailed on the ledger, but no further information on those visits was provided. 3RP 22. Mr. Hillman confirmed that Mr. Dupuy had not been charged more for visits where multiple ailments were addressed. 3RP 25. Mr. Hillman testified that, based on the ledger, Medicare had paid the Doctors Clinic for Mr. Dupuy’s treatment. 3RP 23. The state presented no testimony and made no claim that but for the March 18, 2016 assault, the appointments at the Doctors Clinic from March 2016 to May 2017 would not have occurred.

Ms. Hamamoto testified that if a victim has state health insurance, she will email the insurer to get restitution information. 3RP 42. She testified

that getting a response from state insurance carriers can take months or “even a year.” 3RP 43. She testified that even after an insurance carrier tells her no payments have been made, it is not uncommon from the carrier to contact her “a year or more later” requesting reimbursement. 3RP 43. In this particular case, she emailed Mr. Dupuy’s carrier on January 9, 2018—nearly two years after the assault. CP 162. A representative responded nearly three months after that, clearly stating there were no paid claims for Mr. Dupuy. CP 162. To Mr. Marlin’s knowledge, as of the date this brief is filed, Mr. Dupuy’s insurance agency has not requested reimbursement or acknowledged that any claims have been paid for Mr. Dupuy.

The state argued that restitution should be imposed because Mr. Dupuy’s assault injuries were the “primary purpose” of his visits to the doctor. 2RP 31, 32. The court agreed, imposing restitution in the amount of \$1,177.79: \$236 for Mr. Dupuy’s out of pocket expenses associated with all fourteen appointments from March 18, 2016 through May 15, 2017; \$157 for Mr. Dupuy’s expenses for x-rays and the CT scan in addition to two seemingly unrelated MRIs performed on May 16, 2016; and \$784.79 to Medicare of Washington associated with Mr. Dupuy’s fourteen appointments at the Doctors Clinic. CP 202-03.

The court found that the state had met its burden because it presented testimony that Mr. Dupuy’s medical visits were “associated” with and

“related” to with the March 18, 2016 incident: “I’m finding that the State did meet its burden . . . with Mr. Hillman’s testimony about the 14 visits being associated with the injuries sustained on the March 18th, ’16, porch incident, that they were related.” 2RP 57. While acknowledging that Mr. Dupuy’s preexisting conditions and appointments presented “a really interesting legal concept,” “there was evidence it was related.” 2RP 57. The court continued: “who knows, we might be creating case law on an area for which there is none. But I do think that the State met its burden. If it were a higher burden, I agree with the skepticism . . .” 2RP 58. The court ordered Mr. Marlin to pay \$10 per month toward this \$1,177.79 obligation, in addition to \$25 per month toward his \$700 in other legal financial obligations, for a total of \$35 per month. 2RP 59-60.

Marlin timely appeals. CP 88-97.

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED RESTITUTION BASED ON ITS FINDING THAT MR. DUPUY’S ONGOING TREATMENT WAS MERELY “RELATED” TO THE MARCH 18, 2016 ASSAULT

Assault in the fourth degree is a gross misdemeanor, and the court’s authority to impose restitution in this case is found in RCW 9.92.060(2) and RCW 9.95.210(2). The court can order a defendant convicted of a misdemeanor to pay restitution whenever the crime in question *caused* a loss

to another. State v. Thomas, 138 Wn. App. 78, 82, 155 P.3d 998 (2007) (emphasis added). To prove that a crime caused a victim's loss, the state must establish that the loss would not have occurred but for the crime. State v. Griffith, 164 Wn.2d 960, 966, 195 P.3d 506 (2008); State v. Tobin, 161 Wn.2d 517, 527, 166 P.3d 1167 (2007). Restitution is allowed only for losses that are causally connected to the crimes charged unless the defendant expressly agrees to pay additional restitution. Griffith, 164 Wn.2d 965-66; Tobin, 161 Wn.2d 524 ("Restitution is allowed only for losses that are 'causally connected' to the crimes charged.") Absent agreement from the defendant, the state must prove the restitution amount by a preponderance of the evidence. Id.

A restitution order is reviewed under the abuse of discretion standard. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or imposed for untenable reasons. Id. at 679-80. Application of an incorrect legal analysis can constitute abuse of discretion. Tobin, 161 Wn.2d at 523. A trial court's factual findings must be supported by substantial evidence in the record. State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). Substantial evidence exists where the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the declared premise. Id. at 129. In the context of

restitution, although the claimed loss “need not be established with specific accuracy,” it still must be supported by “substantial credible evidence.” Griffith, 164 Wn.2d at 965.

The trial court abused its discretion when it ordered Mr. Marlin to reimburse Mr. Dupuy and Medicare for appointment costs he and it would have incurred whether the March 18, 2016 incident had occurred or not. Had the incident not occurred, Mr. Dupuy would have had the same monthly appointments with Dr. Lahtinen for which the state now seeks reimbursement. 3RP 13-14. However, Mr. Marlin stipulates that the assault was the “but-for” cause of the x-rays and CT scan ordered, as well as the March 21, 2016 and March 23, 2016 follow-up appointments to review the results of the x-rays and CT scan. These losses were direct results of and *caused by* the March 18, 2016 assault and Mr. Dupuy’s out-of-pocket loss for this care amounts to \$139.00 (\$14.53 per appointment, \$109.94 for x-rays and CT scan).

To impose restitution for the cost of the other appointments (3/18/16, 4/20/16, 5/16/16, 6/14/16, 7/12/16, 8/9/16, 10/4/16, 11/28/16, 12/16/16, 3/20/17, 4/18/17, 5/15/17), losses which were not caused by the crime, is not permitted under clear and established case law requiring causation. To impose restitution solely on the basis that the loss was associated with or related to a crime constitutes an abuse of discretion. See Griffith, 164 Wn.2d

at 966; Tobin, 161 Wn.2d at 527; Thomas, 138 Wn. App. at 82. Whether Mr. Dupuy's monthly appointments that continued to occur after the March 18, 2016 assault—just as they had occurred before it—were related to or associated with the assault, or whether any injuries related to the assault were discussed at one or more of those appointments, is legally irrelevant when considering whether restitution should be imposed.

The only appropriate consideration is whether, but for the March 18, 2016 assault, these appointments would have occurred. Dr. Lahtinen testified that even the March 18, 2016 appointment on the day of the assault was preexisting. 1RP 118, 123. Dr. Lahtinen, who has been Mr. Dupuy's primary care physician for years, provided no heightened or different level of care based on Mr. Dupuy's observed injuries. 1RP 120, 127, 128. According to Dr. Lahtinen, he continues to see Mr. Dupuy for regular follow-up appointments related to other medical problems. 1RP 137. Mr. Dupuy echoed Dr. Lahtinen's testimony when he testified at the restitution hearing: that before March 18, 2016 he saw Dr. Lahtinen once a month for preexisting injuries and pain medication and he continues to do so after. 3RP 13-14. Mr. Hillman's attestation that Mr. Dupuy's appointments from March 21, 2016 through May 15, 2017 were "primarily related to the assault" does not establish that, but for the assault, these appointments would not have occurred. This assertion by Mr. Hillman, a billing specialist, is also

inconsistent with the testimony of Dr. Lahtinen regarding Mr. Dupuy's relatively short healing process of 4-6 weeks. 1RP 120. Even if true, however, the primary purpose of the appointments was legally insignificant; the relevant inquiry is whether those appointments would have occurred had Mr. Marlin not assaulted Mr. Dupuy. Griffith, 164 Wn.2d at 966.

While the trial court acknowledged that Mr. Dupuy's preexisting conditions and appointments presented "a really interesting legal concept," it based its restitution order on its finding that the state presented "evidence [that these costs were] related." 2RP 57. The state at no point argued, and the trial court at no point found, that these appointments were necessitated or caused by the March 18, 2016 assault or that the appointments would not have occurred otherwise.

A trial court abuses its discretion when its decision is imposed for untenable reasons. Enstone, 137 Wn.2d at 679. Application of an incorrect legal analysis can constitute abuse of discretion. Tobin, 161 Wn.2d at 523. The trial court applied an incorrect analysis in imposing restitution for regular monthly appointments on the basis that they were merely associated with or related to the assault, instead of considering whether the appointments would have occurred but for the assault. 2RP 57. Imposition of restitution for costs that would have been sustained whether or not the crime

occurred, regardless of the legal analysis applied, constituted an abuse of discretion.²

Marlin was found guilty of assault in the fourth degree and is responsible only for the value of medical treatment proven by a preponderance of evidence to be causally related—that is, *but for* the incident, the treatment would not have been provided—to his crime. It is undisputed that Mr. Dupuy receives regular medical care for chronic preexisting conditions, and no witness testified that but for the assault, Mr. Dupuy would not have received the care that he did. Whether the care was related to the assault, or the assault was the primary topic at the appointment, is legally irrelevant. Substantial evidence did not support the trial court's finding that the assault caused Mr. Dupuy and his insurance company to incur \$1,177.79 in expenses. The restitution order for Mr. Dupuy's out-of-pocket expenses and reimbursement to his insurance carrier for treatment received subsequent to the incident date must be vacated.

² Again, Mr. Marlin stipulates that the assault was the but-for cause of Mr. Dupuy's March 21, 2016 follow-up appointment, his March 23, 2016 follow-up appointment, his March 18, 2016 x-rays, his March 21, 2016 x-rays, and his March 23, 2016 CT scan.

2. THE STATE FAILED TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT MR. DUPUY'S INSURER SUFFERED ANY LOSS, REQUIRING THE VACATION OF THE COURT'S RESTITUTION ORDER AS IT PERTAINS TO THE INSURER

Restitution is allowed only for losses that are causally connected to the crimes charged. Griffith, 164 Wn.2d 965-66; Tobin, 161 Wn.2d 524. Absent agreement from the defendant, the state must prove the amount of the loss by a preponderance of the evidence. Id.

More than two years after the assault, Mr. Dupuy's insurer explicitly denied paying anything toward any claim for Mr. Dupuy and told Ms. Hamamoto that no claim had been made. CP 162. While Ms. Hamamoto testified as to expected delays in receiving claims from state insurers, here, Mr. Dupuy's insurer denied any payout had been made more than two years after the assault occurred and treatment was provided. 3RP 43; CP 162. As of the date of filing, Mr. Marlin has no knowledge of any new claim now made by Mr. Dupuy's insurer.

Mr. Marlin acknowledges that the state presented evidence that a Doctors Clinic employee believed, based on the ledger, that Medicare had paid the Doctors Clinic for Mr. Dupuy's treatment. 3RP 23. But certainly this testimony cannot establish loss to the insurer by a preponderance of evidence where the insurer itself denies any loss whatsoever, and has yet to

make a claim nearly three years after the care was provided. The state is essentially arguing that there may be a claimed loss in the future, but restitution for speculative losses is prohibited. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). Because Mr. Dupuy’s insurer told the state that it suffered no loss, the state failed to establish by a preponderance of evidence that Mr. Dupuy’s insurer suffered a loss as a result of the March 18, 2016 assault. The restitution order for reimbursement to Mr. Dupuy’s insurance carrier for treatment received subsequent to the incident date must be vacated.

3. THE \$200 FILING FEE MUST BE STRICKEN BASED ON INDIGENCY

In Ramirez, the Washington Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases currently on appeal. Ramirez, 426 P.3d at 721-23.

HB 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c).” Ramirez, 426 P.3d at 721 (citing LAWS OF 2018, ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds

that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”). Under RCW 10.101.010(3)(a) through (c), a person is “indigent” if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.

HB 1783 also amended RCW 36.18.020(2)(h), which now states the \$200 criminal filing fee “shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c).” LAWS OF 2018, ch. 269, § 17. This amendment “conclusively establishes that courts do not have discretion” to impose the criminal filing fee against those who are indigent at the time of sentencing. Ramirez, 426 P.3d at 723. The Ramirez court accordingly struck the criminal filing fee due to indigency. Id. at 722-23. The record here indicates Marlin is indigent under RCW 10.101.010(3). CP 102-03. Because HB 1783 applies prospectively to his case, the sentencing court similarly lacked authority to impose the \$200 filing fee.

Under Ramirez and HB 1783, this court should strike the \$200 criminal filing fee.

D. CONCLUSION

Substantial evidence did not support the trial court's restitution order, requiring vacation of the order.

The trial court abused its discretion when it ordered Mr. Marlin to pay restitution for the cost of appointments not caused by the March 18, 2016 assault and when it ordered Mr. Marlin to pay restitution to Mr. Dupuy's insurer when the insurer denied any loss had occurred. Alternatively, the criminal filing fee must be stricken from Marlin's judgment and sentence.

DATED this 13th day of December, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



LUCIE R. BERNHEIM, WSBA No. 45925
KEVIN A. MARCH, WSBA No. 45397
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

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