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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JESSIE ALERT, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF ASOTIN COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court violated appellant Allert's constitutional right to a public trial when it addressed his capacity to assist counsel and waive his right to testify.
2. The trial court committed manifest constitutional error when it instructed the jury on a non-existent hit and run offense.
3. Defense counsel was ineffective for failing to object to the instruction on a non-existent offense.
4. The trial court exceeded its statutory authority when it imposed restitution to compensate the State for witness expenses.

## **II. ISSUES PRESENTED**

1. Has the defendant met his burden to demonstrate a violation of the public trial right where the court and counsel met in chambers regarding defense counsel's consideration of whether to seek a continuance because her client suffered a cold?
2. Assuming, arguendo, that the interaction implicates the public trial right, was the alleged violation de minimis or invited?
3. Did the "to-convict" instruction regarding the crime of hit and run property damage lower the State's burden of proof where that instruction placed additional, non-statutory duties upon the

defendant, and where the State needed only to prove one of those duties was not fulfilled?

4. Can witness travel expenses be ordered under Washington's restitution statute?

### **III. STATEMENT OF THE CASE**

On November 14, 2017, the State charged the defendant, Jessie Allert, in the Asotin County Superior Court with: (1) possession of methamphetamine with intent to deliver, with a special allegation that, at the time of the commission of the crime, the defendant was armed with a firearm, (2) driving under the influence, (3) driving with license suspended, (4) hit and run with property damage, and (5) unlawful possession of a loaded firearm in a motor vehicle. CP 7-11.

The matter proceeded to a jury trial and the defendant was convicted as charged of all counts. CP 37-39.

#### Substantive facts.

At approximately 8:30 a.m., on November 13, 2017, Asotin County Undersheriff Scott Coppess received a report of an erratic driver in the area of 15<sup>th</sup> and Libby in Clarkston, Washington. RP 100, 104-05. The caller,<sup>1</sup>

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<sup>1</sup> Lisa Ambrose, the caller, observed the defendant's vehicle travel into oncoming traffic, nearly missing another vehicle, travel onto the sidewalk, and strike the mailbox. RP 198-201.

who was following the vehicle, provided a description of the suspect vehicle and the driver. RP 105-06. The reporting party advised dispatch that the vehicle had struck a mailbox on 15<sup>th</sup> Street, the driver stopped, exited, picked up the mailbox and moved it, and then returned to his vehicle and left.<sup>2</sup> RP 106.

Coppess was able to locate the vehicle; the driver, who was later identified as Jessie Allert, stopped his vehicle, exited and approached Coppess before Coppess had an opportunity to activate his emergency lights. RP 106, 108-09. Coppess directed Allert to remain where he was, out of concern for his safety. RP 108.

Coppess approached Allert and asked him about his erratic driving. Allert admitted to poor driving, claiming fatigue; he denied drinking. RP 109. When asked, Allert admitted to striking the mailbox, claiming he intended to find the owner and pay for it. RP 109. While speaking with Allert, Coppess noted his speech was slow, but he did not smell alcohol, and he observed Allert's pupils were "pinpoint" although it was a cloudy day; Coppess believed Allert to be under the influence of a narcotic.<sup>3</sup> RP 111.

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<sup>2</sup> Coppess later found the mailbox which was "basically unrecognizable" had been placed against a warehouse building. RP 116.

<sup>3</sup> Detective Jeffery Talbott of the Idaho State Police was a drug recognition expert (DRE) who examined Allert. RP 162. After placing Allert through a

Allert provided Coppess an Idaho driver's license. RP 110. Dispatch advised that Allert's privilege to drive was suspended in Washington, and he had no license through Idaho. RP 110. Coppess placed Allert under arrest for driving on a suspended license. RP 112. Coppess then returned to Allert's vehicle, a Chevy Lumina, to secure it; when he reached the vehicle, he could see a rifle laying on the rear seat.<sup>4</sup> RP 112.

Law enforcement recovered the rifle from the vehicle after obtaining a search warrant. RP 128-29. A live round was found in the chamber, there were several other unexpended rounds in the rifle, and other ammunition was found in the driver's side door. RP 130.

Also during the search of the vehicle, law enforcement located several other containers. RP 132. A pouch, which was found under the driver's seat, contained a bent spoon, a piece of rope and two clear plastic vials. RP 132-33. Other boxes found on the passenger floorboard contained "a large number of hypodermic needles ... a [portable] weight scale and ...

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battery of tests, Talbott believed Allert was under the influence of a central nervous system depressant, a central nervous system stimulant and a narcotic analgesic, and could not safely operate a motor vehicle. RP 188, 191. The defendant admitted he might have used hydrocodone, a narcotic analgesic at 7:15 a.m. prior to his contact with Coppess at approximately 8:30 a.m. RP 191.

<sup>4</sup> There was no hunting equipment visible in the passenger compartment of the Lumina. RP 113. Allert was not wearing hunting gear. RP 145.

a large number of very small [unusual] Ziploc baggies.”<sup>5</sup> RP 135, 137. The number of baggies was indicative to Coppess that a narcotic substance was being divided into specific portions in order to be sold. RP 136. Forensic testing of one of the vials confirmed that the vial contained methamphetamine hydrochloride. RP 153.

Procedural facts.

Relevant to this appeal, the “to-convict” instruction for the crime of hit and run read, in relevant part:

To convict the defendant of the crime of Hit and Run – Property Damage, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 13th day of November, 2017, the Defendant was the driver of a vehicle;
- (2) That the Defendant’s vehicle collided with property fixed or adjacent to any public highway;
- (3) That the Defendant knew that he had been involved in an accident;
- (4) That the Defendant failed to satisfy his obligation to fulfill all of the following duties:
  - (a) Immediately stop the vehicle at the scene of the accident or as close thereto as possible,

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<sup>5</sup> Also present were more spoons, a butane torch, rubber bands, cotton balls, and, potentially, straws. RP 142-43.

(b) Immediately return to and remain at the scene of the accident until all duties are fulfilled,

(c) To take reasonable steps to either locate the operator or owner of the property struck and give that person his name and address and the name and address of the owner of the vehicle he was operating or leave in a conspicuous place upon the property struck a written notice giving his name and address and the name and address of the owner of the vehicle he was operating;

(5) That any of these acts occurred in Asotin County, the State of Washington.

CP 29. The defendant did not object to this instruction. RP *at passim*.

After the jury instruction conference, defense counsel addressed the court regarding a pretrial conversation between the court and the parties:

MS. RICHARDS: Your Honor, I do. As this Court is well-aware, prior to trial I let the -- I let Your Honor know that my client was very sick and I had talked with him, or I attempted to talk with him in the days prior and he simply couldn't, and his breathing was off, and he couldn't have a conversation with me. And I don't believe I am revealing any client confidences by saying this.

What I want to make sure is that it was my impression that Jessie wanted -- wanted to move forward with trial. As the Court is aware, my client's been coughing and coughing severely, and his breathing has been -- it's been pretty labored, and his voice is -- is very hoarse.

I had brought these concerns to Your Honor and counsel prior to jury selection and Your Honor did ask me, well, what do you want to do? And I was kind of waffling because I -- I just wasn't sure. I had some misgivings. However, and then State's counsel mentioned that they had -- they had to fly somebody here from Hawaii, that there

was some additional costs that were incurred and I think it was generally decided we would soldier on and Your Honor made a remark yesterday about hopefully Mr. Allert would have enough time to heal if we left -- left early.

I want to just make the -- a clear record that it was indeed my client's decision to move forward with trial in light of his sickness and I -- I just -- I want to make sure that that didn't impair his a -- his -- or factor into his ability as to testify or not testify. And, you know, just a clear record that -- I had instructed him that if he was too sick to go to the doctor so that we had some -- some medical documentation that he was not in any condition to be making -- sorry, making decisions to -- regarding trial.

RP 252-54.

The State responded:

MR. LIEDKIE: Your Honor, the only additional record I want to make, because I don't want there to be an argument that there was a closure or a hearing that occurred before -- as counsel had approached -- counsel -- defense counsel had approached the Court about this outside the presence of the State and I was brought into the conversation after it had already been commenced by the defense or -- about his illness. That's when I brought the issue to the attention to the Court as far as the -- the -- the other.

I would note that no motion to continue the trial date was -- was brought on behalf of or by the defendant. I would say that based upon the report that was initially given I was expecting Mr. Allert's coughing to be much more of an issue than it was in the trial. I think there was only a couple two or three episodes where the coughing resulted in needing to stop questioning to allow him to -- to clear his -- his congestion. But it wasn't as -- as -- as bad as we -- as I had braced for.

And so, -- but in any event, I believe the Court treated it as a -- a ministerial issue concerning scheduling and not a -- not anything that touched upon the facts or -- or the disposition of the case itself. So ... I'm always nervous. Any time somebody walks back into chambers I get nervous because the Courts are not very friendly with -- with -- with things of that nature. And so, that was not -- this wasn't something that was -- in fact, it was already occurring when the State - - when I wandered back to let the Court know we were ready to proceed.

RP 254-55.

The court and defense counsel confirmed that there had been no discussion of any substantive matters. RP 255. Defense counsel dismissed the State's concerns stating, "I don't know what the point of that was, but, at any rate" and "well, whatever." RP 255. The prosecutor again shared his concerns that a courtroom closure claim might be raised on appeal, to which defense counsel again dismissed the State's concerns, noting, "I think that's ... well within the province of the judge and I think Mr. Liedkie can be well assured that our Judge is very competent and able to -- protect that." RP 256.

The court later submitted the matter to the jury, and the jury found the defendant guilty of all counts. CP 37-39. The defendant had an offender score of "0" and was sentenced to 87 months for possession of methamphetamine with intent to deliver -- 51 months for the base offense and 36 months for the enhancement. CP 46, 48. The court imposed the maximum sentences allowable on the remaining misdemeanors, all of

which ran concurrently to the felony. CP 48. The court imposed restitution of \$1,271.09 which “include[d] travel for witnesses in the defendant’s case, specifically [an] ... airplane ticket” and travel expenses for the Department of Licensing Records Custodian. RP 327-29. The defendant appeals.

#### **IV. ARGUMENT**

##### **A. THE EX PARTE COMMUNICATION COMMENCED BY DEFENSE COUNSEL WAS NOT A COURTROOM CLOSURE.**

The defendant complains that a brief, partially ex parte communication between his counsel and the trial court violated his right to a public trial, and, therefore, requires a reversal of his conviction. The record establishes that prior to trial, defense counsel met with the trial judge, apparently in the judge’s chambers and initially without the prosecutor’s presence; the prosecutor arrived mid-way through the conversation. During that meeting, the defense attorney advised the court that her client had a cold, and that it was her impression that he desired to proceed to trial notwithstanding that fact. In light of that information, the court asked defense counsel what she “wanted to do.” Counsel “waffled.” Joined by the prosecutor and being advised a witness was being flown in from Hawaii, the parties decided to “soldier on.”

Defense counsel further stated, on the record, that the defendant’s cold “didn’t factor into his ability to testify,” and that if his ability to proceed

to trial had been impaired, counsel had advised the defendant to procure a note from a doctor that his ability to assist in his defense was affected by his illness. When the State expressed concern that this contact amounted to a courtroom closure, those concerns were summarily dismissed by both the court and the defense attorney.

Whether a defendant's constitutional right to a public trial has been violated is a question of law, which an appellate court reviews review de novo on direct appeal. *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012). A criminal defendant has a constitutional right to a public trial under article I, section 22, of the Washington State Constitution. *State v. Love*, 183 Wn.2d 598, 604, 354 P.3d 841 (2015); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The public also has a constitutional right to attend court proceedings; article I, section 10, guarantees the public that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986).

In analyzing alleged open court violations, this Court applies a three-step analysis: (1) whether the public trial right attaches to the proceeding at issue; (2) if the right attaches, whether the courtroom was closed; and (3) whether such closure was justified. *Love*, 183 Wn.2d at 605.

“The appellant carries the burden on the first two steps; the proponent of the closure carries the third.” *Id.* If an appellate court concludes that the right to a public trial does not apply to the proceeding at issue, the court does not reach the second and third steps in the analysis. *State v. Smith*, 181 Wn.2d 508, 519, 334 P.3d 1049 (2014).

Thus, a reviewing court must first determine whether the proceeding at issue even implicates the public trial right. *State v. Sublett*, 176 Wn.2d 71, 292 P.3d 715 (2012); *State v. Parks*, 190 Wn. App. 859, 864, 363 P.3d 599 (2015), *review denied*, 185 Wn.2d 1032 (2016). “[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.” *Sublett*, 176 Wn.2d at 71.

To resolve whether the public trial right attaches to a particular “proceeding,” the court applies the “experience and logic” test. *Id.* at 72-73. Under the “experience” prong, the court considers whether the proceeding at issue has historically been open to the public. *Id.* at 73. Under the “logic” prong, the court asks “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* A defendant must satisfy both prongs. *Id.* Consideration is given to whether openness will “enhance[] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”

*State v. Whitlock*, 188 Wn.2d 511, 521, 396 P.3d 310 (2017) (alteration in the original).

1. Experience prong.

It is the defendant's burden to show, as a matter of experience, that an ex parte contact or conversation relating to *potential* scheduling matters has "historically been open to the press and general public." *See State v. Jones*, 185 Wn.2d 412, 422, 372 P.3d 755 (2016). Here, the defendant has failed to make this showing, other than by his bald attempts to cast the interaction as equivalent to competency or capacity proceedings, challenges to potential jurors, or other proceedings historically open to the public. However, the experience prong counsels that the interaction that occurred in this case is administrative or ministerial, or more akin to a sidebar conference or scheduling task, to which the public trial right does not attach.

The defendant has not identified any case that holds that a trial court's ex parte contact with defense counsel about potential scheduling matters constitutes a closure or violates the defendant's (or public's) constitutional rights. Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978).

Rather, the interaction that occurred initially between defense counsel and the judge was ministerial or administrative in nature – defense counsel simply advised the court her client was sick, and that she might request a continuance if he was unable to proceed to trial. No substantive decision was made by the trial court. The court did not make any determinations about the defendant’s competency or capacity to assist in his defense. At the conclusion of the interaction, the status quo had not changed – the parties indicated a readiness for trial as scheduled.

Ministerial or administrative tasks are not historically open to the public and do not implicate the public trial right. In *Parks, supra*, the defendant argued that his right to a public trial was violated when the trial court swore in a large venire in the jury assembly room. 190 Wn. App. at 862. In analyzing the experience prong of the open court test, this Court found that swearing in the venire prior to selection was analogous to an administrative component of jury selection to which the public trial did not attach. *Id.* at 866. Likewise, the Supreme Court in *Jones* found that a judicial assistant’s act of drawing jurors’ names during a recess to designate alternate jurors did not implicate the defendant’s public trial right. *Jones*, 185 Wn.2d at 422-26. A brief discussion during which the court is notified that a party *might* ask for a continuance based upon facts that may develop at a later time is administrative in nature. It pertains to only to the

management of the timing of trial itself; contrary to the defendant's current assertions, there is no evidence, whatsoever, that the court made any substantive determinations about Mr. Allert's ability to proceed to trial.

Also more akin to this interaction are sidebar conferences. In *Smith*, 181 Wn.2d 508, our Supreme Court held that a sidebar conference held in a hallway outside of the courtroom did not implicate the public trial right. Sidebar conferences have "historically occurred outside the view of the public." *Id.* at 515. The court noted that proper sidebars "deal with mundane issues implicating little public interest." *Id.* A conversation about the defendant's mundane cold would implicate little public interest unless it *actually* affected his ability to proceed to trial or assist in his own defense. The matter proceeded to trial as scheduled pursuant to Mr. Allert's wishes, and counsel represented, on the record, that the defendant's cold did not factor into his decision not to testify.

Here, the defendant fails to meet his burden to establish the first prong of the experience and logic test. Nothing that occurred during the *ex parte* interaction between defense counsel and the court (or during that interaction after it was joined by the prosecutor) was anything that has been or would normally be open to the public and to the press. If every administrative request for a continuance were something that were open to the public, then every scheduling order presented, *ex parte*, would

necessarily violate the constitutional guarantee to an open court. *See also*, *State v. Moore*, 178 Wn. App. 489, 504, 314 P.3d 1137 (2013) (continuance motion hearings are not hearings at which defendant's appearance is required under CrR 3.4(a)); *State v. Raschka*, 124 Wn. App. 103, 100 P.3d 339 (2004) ("A status conference is not a hearing at which [a defendant's] appearance is required under CrR 3.4(a)" unless he had been ordered to attend).<sup>6</sup> If continuances, sidebars, and other administrative actions may be conducted outside the public's presence, then certainly, an informal discussion about the defendant's cough or notice to the court that a continuance *may* be requested in the future is not something that implicates the public trial right.

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<sup>6</sup> *And see*, *State v. Rhodes*, 9 Wn. App. 1073, 2019 WL 3413643, *review denied*, 2019 WL 6607160 (2019) (unpublished opinion) (experience and logic test suggested no public trial right was implicated by entering orders of continuance); *State v. Howard*, 199 Wn. App. 1001, 2017 WL 2117044 (2017) (unpublished opinion) (defendant failed to satisfy the experience prong of the experience and logic test in claiming that trial court's entry of orders continuing trial within the speedy trial period). Under GR 14.1, a party may cite to an unpublished decision of the Court of Appeals filed on or after March 1, 2013. Unpublished opinions of the Court of Appeals have no precedential value, are not binding on any court, and may be accorded such persuasive value as the court deems appropriate. GR 14.1(a).

2. Logic prong.

To establish the logic prong, the defendant must establish “public access plays a significant positive role in the functioning of the particular process in question.” *Sublett*, 176 Wn.2d at 73. In analyzing this prong, an appellate court looks to whether openness advances the purposes of the public trial right: “to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *Id.* at 72.

The defendant cannot establish the logic prong, nor has he attempted to do so. None of the values served by the public trial right is undermined by a brief conversation about the defendant’s health wherein the court is simply put on notice that a continuance might be requested if the defendant is physically unable to proceed to trial as scheduled. The defendant has not supplied any authority establishing the need for the public’s presence for this type of interaction. Experience would counsel that openness of this contact would not ensure a fair trial, or remind the prosecutor and judge of their responsibility to the accused. In fact, the prosecutor was not even present for part of the conversation, and apparently had no role in the conversation other than to advise the court and defense counsel that a witness would be arriving for trial from Hawaii. This

conversation did not involve witnesses, jurors, or testimony; thus, the openness of the communication would not dissuade perjury. Finally, the defendant has not shown that public access plays any role, let alone a significant role in this type of discussion or would otherwise enhance the fairness of his trial and the appearance of fairness. *See, Parks*, 190 Wn. App. at 867. The openness of a brief discussion about the defendant's cold, during which no decisions changing the status quo were made by the court, would not enhance the fairness or the truth-seeking function of the defendant's trial.

It is the defendant's burden to demonstrate that the initially ex parte interaction between his attorney<sup>7</sup> and the court is one to which the public trial right attaches. He has failed to do so. Because the interaction does not implicate the public trial right, the inquiry ends there.

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<sup>7</sup> As a policy matter, it could be troublesome for the court to hold that an ex parte conversation, such as this, which was apparently initiated by defense counsel and during which the court made no decisions whatsoever violated the public trial right. Such a holding could invite mundane ex parte contacts by defendants such that they could gamble on a jury verdict, lose, and then seek a new trial by claiming a public trial violation.

3. Even if this interaction implicated the public trial right, it was de minimis and/or invited.

Here, even if the defendant could establish the interaction implicated the public trial right (and therefore, a closure occurred because the interaction occurred in chambers), any conceivable open court violation was de minimis. *See State v. Schierman*, 192 Wn.2d 577, 438 P.3d 1063 (2018) (although the Supreme Court found a public trial violation regarding a brief, in-chambers conference dealing with several for cause challenges during a four-month long aggravated first degree murder case, the doctrine of de minimis error applied because it involved no factual determinations and did not implicate the purposes of a public trial). While a defendant need not object to a courtroom closure in order to preserve the issue for direct appeal, the lack of objection is an indication that the trial remained fundamentally fair. *Id.* at 614.

Here, the defendant did not object below. When the State raised concerns that Mr. Allert may raise a public trial error on appeal, his attorney was dismissive that the substance of the in camera conversation could be reasonably construed as a courtroom closure. Counsel must have believed that nothing was discussed during the in chambers conference that would have impacted the fundamental fairness of her client's trial or that was subject to the public trial right. Here, as in *Schierman*, there were no factual

determinations that were made during the in-camera discussion about the defendant's health. No decisions were made that changed the existing trial date or the status quo, or affected any other right of the defendant or public. Thus, any conceivable violation was de minimus.

Additionally, an open court violation may be invited. *Matter of Salinas*, 189 Wn.2d 747, 757, 408 P.3d 344 (2018). Where defense counsel "played the initiating and sustaining role that led to private questioning of jurors" our Supreme Court found that the defendant could not "now be heard to complain that the very procedure he proposed was employed by the trial court." *Id.* Here, the record would indicate that defense counsel approached the court about her client's health to put the court on notice that a continuance may be requested. The defendant should not now be able to complain that this conversation violated the public trial right. The defendant's claim of error fails.

**B. THE STATE CONCEDES THAT THE TO-CONVICT INSTRUCTION FOR HIT AND RUN LOWERED THE STATE'S BURDEN OF PROOF.**

"An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). An erroneous jury instruction that omits or misstates an element of a crime is subject to harmless error analysis to determine whether the error has relieved the State of its burden of proof;

to determine whether an erroneous instruction is harmless in a given case it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id.* at 344.

RCW 46.52.010(2) provides:

The driver of any vehicle involved in an accident resulting only in damage to property fixed or placed upon or adjacent to any public highway shall take reasonable steps to locate and notify the owner or person in charge of such property of such fact and of the name and address of the operator and owner of the vehicle striking such property, or shall leave in a conspicuous place upon the property struck a written notice, giving the name and address of the operator and of the owner of the vehicle so striking the property, and such person shall further make report of such accident as in the case of other accidents upon the public highways of this state.

WPIC 97.08 provides:

To convict the defendant of the crime of hit and run, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about(date), the defendant was the driver of a vehicle;
- (2) That the defendant's vehicle collided with property [fixed] [or] [placed upon] [or] [adjacent to] any public highway;
- (3) That the defendant knew that [he] [she] had been involved in an accident;
- (4) That the defendant failed to satisfy [his] [her] obligation to fulfill both of the following duties:
  - (a) To take reasonable steps to either locate the operator or owner of the property struck and give

that person [his] [her] name and address [and the name and address of the owner of the vehicle [he] [she] was operating] or leave in a conspicuous place upon the property struck a written notice giving [his] [her] name and address [and the name and address of the owner of the vehicle [he] [she] was operating]; and

(b) To report the accident, by (fill in applicable reporting requirement; see Comment), and

(5) That any of these acts occurred in the [State of Washington] [City of ] [County of ].

Here, however, the trial court instructed the jury:

To convict the defendant of the crime of Hit and Run – Property Damage, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 13th day of November, 2017, the Defendant was the driver of a vehicle;
- (2) That the Defendant's vehicle collided with property fixed or adjacent to any public highway;
- (3) That the Defendant knew that he had been involved in an accident;
- (4) That the Defendant failed to satisfy his obligation to fulfill *all of the following duties*:
  - a. *Immediately stop the vehicle at the scene of the accident or as close thereto as possible.*
  - b. *Immediately return to and remain at the scene of the accident until all duties are fulfilled,*
  - c. To take reasonable steps to either locate the operator or owner of the property struck and give that person his name and address and the name and address of the owner of the vehicle he was

operating or leave in a conspicuous place upon the property struck a written notice giving his name and address and the name and address of the owner of the vehicle he was operating;

(5) That any of these acts occurred in Asotin County, the State of Washington.

CP 29 (emphasis added).

This instruction was clearly erroneous – and was a hybrid of WPIC 97.08 and WPIC 97.02 (which sets forth the elements required for the crime of failing to remain at the scene of an injury or fatality accident). The instruction imposed additional duties upon the defendant that are not required by law when a person has been involved in an accident resulting only in property damage. While the addition of non-statutory elements may, in some cases, not lower the State’s burden of proof, the State concedes that, in this case, the italicized language above had that effect.

Under the to-convict instruction that was given, the defendant had the duty to immediately stop his vehicle, *and* remain at the collision scene until *all* of his other duties were fulfilled. However, the hit and run property damage statute would allow for an individual involved in such a collision to leave the scene to locate the owner of the property. Hypothetically speaking, Mr. Allert could have known the property owner, and left the scene to personally notify the property owner of the collision without violating RCW 46.52.010(2). Under the to-convict instruction, however, the

jury need only have found that Mr. Allert failed to stop his vehicle immediately at the scene of the collision or remain there in order for it to return a guilty verdict. The State concedes that the conviction for Count 4, Hit and Run – Property Damage, should be reversed.

**C. THE STATE AGREES THAT THE RESTITUTION ORDER SHOULD BE VACATED INsofar AS IT REIMBURSES THE STATE FOR WITNESS TRAVEL EXPENSES FOR TRIAL.**

Upon the State’s request and over the defendant’s objection, the court imposed restitution of \$1,271.09<sup>8</sup> which “includes travel for witnesses in the defendant’s case, specifically [an] ... airplane ticket” and travel expenses for the Department of Licensing Records Custodian. RP 327-29.

An appellate court will not disturb the trial court’s entry of a restitution order on appeal absent an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). Discretion is abused only when exercised in a manifestly unreasonable manner or on untenable grounds or reasons. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). In that context, our high court has stated, “[t]he legislature intended to grant broad powers of restitution to the trial court.” *Tobin*, 161 Wn.2d at 524.

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<sup>8</sup> The record appears to indicate the airplane ticket cost \$750, but does not indicate whether any other expenses were included in the total requested restitution.

The authority to impose restitution is statutory. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Per the statute, the court shall order restitution “whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property.” RCW 9.94A.753(5). Restitution is appropriate whenever there is a causal connection between the defendant’s crimes and the injuries. *Tobin*, 161 Wn.2d at 524. “Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss.” *Griffith*, 164 Wn.2d at 966 (*citing Tobin*, 161 Wn.2d at 524). The State concedes that there is no causal link between the defendant’s crimes and the “restitution” imposed here – the costs of witness travel to and from trial. Therefore, the State concurs with the defendant’s request that the restitution order be stricken in so far as it reimburses witness travel expenses for trial.

## V. CONCLUSION

The defendant’s alleged open court violation has no merit. Experience counsels that, historically, ex parte contacts between defense counsel and the court, administrative actions, and scheduling matters are not interactions that generally occur in an open court. Logic counsels that public observation of such an interaction would serve no purpose and would not ensure the fairness of the proceedings.

The State concedes prejudicial error in the to-convict jury instruction for Count 4, Hit and Run – Property Damage, and this count should be reversed and remanded. Similarly, the State concedes error in the imposition of witness travel expenses as restitution; that order should be stricken.

Dated this 19 day of December, 2019.

BENJAMIN C. NICHOLS  
Asotin County Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", written over a horizontal line.

Gretchen E. Verhoef, WSBA #37938  
Special Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JESSIE M. ALLERT,

Appellant,

NO. 36718-5-III

CERTIFICATE OF SERVICE

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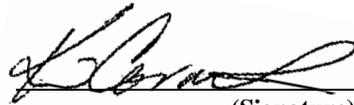
I certify under penalty of perjury under the laws of the State of Washington, that on December 19, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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Spokane, WA  
(Place)

  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

**December 19, 2019 - 10:22 AM**

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