

NO. 64994-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEMITRI FORTE,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS, JUDGE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JENNIFER ROEN PETERSEN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES PRESENTED

1. Did the trial court properly find sufficient evidence established a causal connection between the assault and lost wages when it considered the victim's sworn declaration, the employer's confirmation, supporting medical documentation, and supporting documentation from the Crime Victims Compensation Program?

2. Did the trial court have a reasonable basis for calculating lost wages when it relied on the victim's sworn declaration, the employer's confirmation, supporting medical documentation, and supporting documentation from the Crime Victims Compensation Program?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

On October 6, 2008 Forte was charged with one count of Burglary in the First Degree. CP 1. On June 18, 2009 Forte pled guilty to a reduced charge of Residential Burglary and Assault in the Second Degree. CP 26-27. As part of the plea agreement Forte stipulated to real facts set forth in the Certification for the Determination of Probable Cause. CP 33. A restitution hearing was held on December 8, 2009 and Forte was ordered to pay

\$1,918.00 in medical bills. CP 53-54. The parties agreed to extend the 180 day deadline to address the issue of lost wages. CP 53-54; RP 16-20. On January 26, 2010 the court entered a second restitution order ordering Forte to pay \$10,436.40 in lost wages. CP 55. The order of restitution is joint and several with co-defendant Dean Upton and juvenile co-defendant Kenneth Mead. CP 55.

2. SUBSTANTIVE FACTS

On September 30, 2008 Cameron Hurley was at home in his apartment. CP 8. Hurley answered a knock on his door and when he opened the door three individuals, including Forte, forced their way into his apartment. CP 8. Once inside the apartment the individuals demanded to know where Hurley's money was and they struck him several times on the head, neck and back with "metal pipes and / or baseball bats." CP 8. Hurley was transported to St. Francis Hospital where he was treated for severe lacerations to his head and "apparent neck and back injuries." CP 8.

On June 18, 2009 Forte pled guilty to Residential Burglary and Assault in the Second Degree. CP 26-27. On December 8, 2009 the court entered its first Order Setting Restitution ordering Forte to pay Hurley's medical bills in the amount of \$1,918.00. CP

53-54. This amount included five months of chiropractor bills. Appendix C to Respondent's Brief. Forte did not dispute the amount requested for medical bills. 1RP 14. The parties agreed to extend the 180 deadline to seek restitution because Forte requested additional documentation of Hurley's lost wages. CP 53-54; RP 16-20. On January 26, 2010 the court entered a second restitution order ordering Forte to pay \$10,436.40 in lost wages. CP 55.

The documentation submitted in support of the state's request for restitution included Hurley's medical bills documenting radiology bills from September 30, 2008 and treatment with a chiropractor from December 22, 2008 through April 28, 2009. Appendix C to Appellant's Brief. The documentation also included Hurley's sworn statement contained in the Crime Victims Application for Benefits form dated November 3, 2008. Appendix A to Appellant's Brief. In this sworn statement Hurley stated "I got hit in my head several times and my upper body. I got staples in my head and cracked ribs from this invasion." Appendix A to Appellant's Brief. Hurley stated that prior to the assault he earned \$15 per hour and worked an average of 36 hours per week at B&B Lawn and Hauling. Appendix A to Appellant's Brief.

The State also provided the court with a declaration from Kim Vincent with the Crime Victims Compensation Program. Appendix B to Appellant's Brief. Vincent called B&B Lawn and Hauling on November 20, 2008 and spoke with Hurley's employer Darnell Morris. Appendix B to Appellant's Brief. Morris confirmed Hurley's wage and hours and stated that he had not been back to work as he still had a cast on his hand. Appendix B to Appellant's Brief. The Crime Victims Compensation Program paid Hurley \$10,436.40 in lost wages. Appendix D to Appellant's Brief.

The court considered Hurley's declaration, Vincent's declaration, the medical documentation, and the amount paid to Hurley by Crime Victims Compensation Program and found by a preponderance of the evidence that the lost wages were a direct result of the crime. RP 20-21; CP 54, 55.

C. **ARGUMENT**

"Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person" and whenever the offender agrees to pay restitution to his or her victims. RCW 9.94A.753. The amount of restitution must be "based on easily ascertainable damages for injury to or loss of

property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. RCW 9.94A.753(3).

Restitution must be supported by "substantial credible evidence" although it "need not be established with specific accuracy." State v. Fleming, 75 Wn.App. 270, 274-275, 866 P.2d 243 (1994). 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. State v. Griffith, 163 Wn.2d 960, 966, 195 P.3d 506 (2008).

A trial court has discretion to determine the amount of restitution. State v. Mark, 36 Wn.App. 428, 433, 675 P.2d 1250 (1984). The appellate court will find an abuse of discretion only when "discretion is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Mark, 36 Wn.App. at 433 (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

1. The State Proved by a Preponderance of the Evidence That the Lost Wages Were Causally Connected to the Crime Charged.

Restitution is allowed only for losses that are "causally connected" to the crime charged. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). Courts utilize a "but for" inquiry in

determining causation. Tobin, 161 Wn.2d at 524. Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. Id. at 524.

In State v. Blanchfield, 126 Wn.App. 235, 241, 108 P.3d 173 (2005), the trial court ordered restitution for medical expenses incurred as a result of a domestic violence assault. Blanchfield appealed arguing that the victim's testimony and the Crime Victims Compensation Program report were insufficient to establish a causal connection between the medical expenses and the assault. Blanchfield, 126 Wn.App. at 241-42. The Court of Appeals found the evidence was sufficient to establish the required causal connection. Id. at 242. The court noted that the victim testified that she incurred the expenses as a result of the assault and that the Crime Victims Compensation Program report documented claims paid to the victim for medical treatment. Id.

In this case, the State provided Hurley's medical bills documenting a radiology visit on September 30, 2008 - the same date as the assault. Appendix C to Respondent's Brief. The State also provided Hurley's chiropractor bills from December 22, 2008 through April 28, 2009. Appendix C to Respondent's Brief. The State provided the Crime Victims Application for Benefits form in

which Hurley claimed loss of income as a result of being repeatedly struck with a metal pipe in the head and upper body. Appendix A to Appellant's Brief. Kim Vincent with the Crime Victims Compensation Program submitted a declaration that she confirmed with Hurley's employer that he had not been back to work. Appendix B to Appellant's Brief. Finally, the State provided a report from the Crime Victims Compensation Program documenting claims paid to Hurley for lost wages. Appendix D to Appellant's Brief.

The court found that Hurley's lost wages were a direct result of the assault. RP 20. The court noted that Hurley provided a sworn statement confirming his wages and hours and that the employer confirmed the information. The court further noted that Hurley was in treatment with a chiropractor for seven months and that appellant agreed to those medical bills. The court pointed out, "It's certainly understandable if you're in treatment with a chiropractor or you need treatment by a chiropractor, that you -- you can't do the kind of heavy work associated with working for a landscaping business, cast or no cast." RP 21. The evidence in this case is sufficient to establish a causal connection.

Appellant attempts to analogize the facts of this case to State v. Dennis, 101 Wn.App. 223, 6 P.3d 1173 (2000) in arguing the State failed to establish a causal connection between the crime and the lost wages. Dennis provides no support for appellant's argument.

Dennis was convicted of assaulting three police officers. Dennis, 101 Wn.App. at 227. The State provided the court with a letter from the King County Prosecuting Attorney's Office Victim Assistance Unit and the State's Certification of Probable Cause stating that Officers Dornay and Libby were treated at Northwest Hospital for their injuries. Id. at 228. The State also provided a letter from the City of Seattle Workers Compensation Unit referencing Officer Dornay's balance of \$106.48 for the amount paid to Northwest Hospital. Id. This letter noted Officer Dornay's injury occurred on the same date as the assault. Id. The court found this documentation was sufficient to establish the required causal connection as to Officer Dornay's injuries. Id.

However, the court in Dennis found insufficient evidence to establish a causal connection between *Officer Libby's* injuries and Dennis's assault. The court made this finding because the only evidence provided on behalf of Officer Libby indicated Officer Libby

was treated at Northwest Hospital for injuries on an unknown date. Id. at 228. The dearth of evidence provided in support of Officer Libby's claim is easily distinguishable from that provided in support of Hurley's claim.

As in Blanchfield and Dennis, the evidence in this case is sufficient to establish a causal connection. Hurley sought medical treatment on the day of the assault and he continued to receive medical treatment for seven months. Forte agreed to this portion of the restitution order. Hurley provided a sworn declaration that was corroborated by his employer, medical documentation and documentation of claims paid by the Crime Victims Compensation Program. The State established by a preponderance of the evidence that "but for" the assault, Hurley would not have incurred the loss. There was no abuse of discretion.

2. The Evidence Presented Provided a Reasonable Basis for Estimating the Loss.

Easily ascertainable damages are tangible damages supported by sufficient evidence. State v. Bush, 34 Wn.App. 121, 123, 659 P.2d 1127 (1983). Certainty of damages need not be proven with specific accuracy. Mark, 36 Wn.App. at 434. "Once the fact of damage is established the amount need not be shown

with mathematical certainty. Evidence of damage sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture." Id. at 434.

In this case, the amount of lost wages was easily ascertainable and proved by sufficient evidence. In the Crime Victims Application for Benefits form dated November 3, 2008, Hurley claimed he had not yet returned to work following the September 30, 2008 assault. Appendix A to Appellant's Brief. Hurley's employer was contacted on November 20, 2008 and stated that Hurley had not yet returned to work. Appendix B to Appellant's Brief. The State submitted chiropractic bills through April 28, 2009. Appendix C to Appellant's Brief. Documentation from the Crime Victims Compensation Program proved they paid Hurley \$10,436.40 in lost wages. Appendix D to Appellant's Brief. By accepting payment from the Crime Victims Compensation Program through April 2009 Hurley represented that he had not returned to work.

The court relied on the documentation provided and awarded lost wages from September 30, 2008 through April 28, 2009. There was nothing speculative about this calculation of damages. The court relied on Hurley's declaration and his

employer's confirmation, supporting medical bills, and the amount already paid out by Crime Victims Compensation Program.

The court considered the fact that Hurley's injuries were serious enough to require medical treatment for seven months following the assault and the fact that Forte did not dispute this portion of the restitution order. The court further noted that the medical documentation provided supported the claim given the type of "heavy work" Hurley had been engaged in. RP 21. Finally, by accepting payment from the Crime Victims Compensation Program Hurley represented he had not returned to work. Given this evidence it was reasonable for the trial court to find that Hurley missed seven months of work as a result of the assault. The standard here is abuse of discretion. It cannot be said the court's decision was "manifestly unreasonable."

3. Alternatively, the State Provided Sufficient Evidence Supporting a Claim of Lost Wages Through November 20, 2008.

If this Court finds the award of lost wages through April 2009 was impermissibly speculative, it should order \$3,780.00 in lost wages through November 20, 2008. This amount of lost wages was confirmed by Hurley's employer and corroborated by payments made by the Crime Victims Compensation Program.

Hurley provided a sworn declaration on November 3, 2008 stating he had not returned to work following the September 30, 2008 assault. Hurley's employer confirmed on November 20, 2008 that Hurley had not yet returned to work. The declarations are supported by the medical bills and the facts set forth in the Certification for the Determination of Probable Cause which appellant did not dispute.

D. CONCLUSION

For the foregoing reasons, this Court should affirm the restitution order entered on January 28, 2010. Alternatively, this Court should remand with instructions to enter a modified order reducing the amount of lost wages to \$3,780.00.

DATED this 5th day of October, 2010.

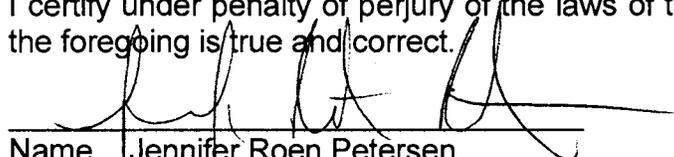
RESPECTFULLY submitted,
DANIEL T. SATTERBERG
Prosecuting Attorney

By: 
JENNIFER ROEN PETERSEN, WSBA 35397
Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DEMITRI FORTE, Cause No. 64994-9-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name Jennifer Roen Petersen
Done in Seattle, Washington

October 5, 2010
Date October 5, 2010