

71333-7

71333-7

NO. 71333-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KENNETH ADEE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. A sentencing court may award restitution only for losses caused in fact by a defendant's crime and for easily ascertainable damages. Adee was convicted of misdemeanor harassment and resisting arrest. Adee did not comply when Officer Decker attempted to arrest him and Decker had to respond with force to take Adee to the ground and place him in handcuffs. Decker broke his left hand during this struggle. Did the sentencing court properly order restitution for Decker's lost wages and medical treatment incurred as a result of his injury sustained while arresting Adee?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Kenneth Adee by information with three counts for his actions on July 27, 2012: felony cyberstalking, a crime of domestic violence, for his text message threats to kill his mother; third degree malicious mischief, a crime of domestic violence, for damaging his parents' property; and third degree assault for spitting on Seattle Police Officer Chet Decker. CP 1-2. Adee pled guilty to misdemeanor harassment and resisting arrest.

CP 7, 9-17. Judge Catherine Schaffer imposed a 12 month deferred sentence on both charges on condition that Adee pay \$600.00 plus restitution, commit no criminal offenses, and have no knowing contact with Seattle Police Officer Chet Decker. CP 25.

The State sought restitution on behalf of the City of Seattle Workers' Compensation Unit for medical expenses and wage loss incurred as a result of Officer Decker's injury to his hand, which was broken during the course of Adee's arrest. CP 70-83, 85. The sentencing court considered the State's request for restitution on November 26, 2013. RP 3.¹ The sentencing court denied Adee's attorney's request to continue the hearing to present declarations and the in-car video of Adee's arrest. RP 15-16. The sentencing court accepted Adee's attorney's offer of proof of what the declarations and in-car video would have shown. Id. The sentencing court reviewed the documentation provided by the State and then ordered Adee to pay restitution of \$12,851.70 for the lost wages and medical treatment for Decker's broken hand. RP 10-17; CP 30.

¹ The verbatim report of proceedings consists of a single volume dated November 26, 2013.

2. SUBSTANTIVE FACTS

On July 27, 2012, Seattle Police responded to the home of Adee's parents after his mother and father each called 911. CP 4. Adee's parents stated that Adee was "out of control" and was screaming and destroying property in the basement. Id. His mother, Laurie Adee, received a series of text messages from Adee that included texts stating, "You're dead," and, "Never stop I'll never stop lol ur dead." Id. On the last 911 call, Bruce Adee stated that his son was at his house, yelling, screaming, and threatening to kick in the front door. Id. Bruce Adee had heard his son threaten, "I'm going to get my gun," and then saw his son walk back to a truck. Id. Bruce Adee relayed to the 911 operator that he believed his son may have been going to get a gun from the truck. Id.

Seattle Police Officer Chet Decker arrived along with another officer at Adee's parents' home in response to their 911 calls. CP 5. Upon arrival, Decker believed that Adee may be armed with a gun due to the threats relayed via 911. Id. Adee ran towards the house and officers chased him to prevent him from entering his parents' home. Id. Decker grabbed Adee's shoulder and ordered him to the ground. Id. Adee refused and turned around with a balled up fist and a stance appearing as if he would fight the

officers. Id. Officers struggled with Adee. Id. Adee refused to put his hands behind his back. Id. During this altercation, Decker's left hand was broken. Id. Adee then spit in Decker's face. Id.

Adee agreed in his plea agreement that these facts from the certification for determination of probable cause could be considered as real and material facts for purposes of sentencing. CP 23.

In his statement on plea of guilty, Adee admitted that on July 27, 2012, he had threatened Laurie Adee with bodily injury by sending her text messages, that Laurie Adee was in reasonable fear of his threats, that he intentionally attempted to prevent Seattle Police from lawfully arresting him, and that he attempted to pull away from Officer Decker while being arrested. CP 16.

C. ARGUMENT

1. THE SENTENCING COURT PROPERLY ORDERED RESTITUTION BASED ON THE CAUSAL CONNECTION BETWEEN ADEE'S CRIMES AND OFFICER DECKER'S INJURY.

Adee asserts that the sentencing court erred in finding a causal connection between Adee's conviction for resisting arrest and the restitution for Officer Decker's injury. Specifically, he

claims that his conviction for resisting arrest did not include the force used by Decker to take him to the ground and that the documentation was insufficient to establish the amount of restitution. Adee's claim fails on both grounds. The sentencing court did not abuse its discretion in finding the causal connection between Adee's conviction and Decker's injuries and in finding the documentation sufficient to establish the amount of restitution.

The authority to order restitution is purely statutory. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007); City of Seattle v. Fuller, 177 Wn.2d 263, 272, 300 P.3d 340 (2013); State v. Marks, 95 Wn. App. 537, 540, 977 P.2d 606 (1999). The sentencing court may award restitution on misdemeanor offenses pursuant to its authority under RCW 9.95.210(2). Fuller, 177 Wn.2d at 271; Marks, 95 Wn. App. at 540. RCW 9.95.210 provides in relevant part:

(2) In the order granting probation and as a condition thereof, . . . The superior court may also require the defendant to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary. . . (b) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question. . .

The only difference between the award of restitution under RCW 9.95.210, the misdemeanor statute, and under RCW 9.94A.753, the restitution statute for felonies, is that there is not a 180 day time limit on the imposition of restitution in the misdemeanor statute. Marks, 95 Wn. App. at 540 (analyzing RCW 9.94A.142 recodified as RCW 9.94A.753 by Laws 2001, ch. 10, section 6).

The Washington Supreme Court has held that the language of the state's restitution statutes evinces a legislative intent to grant broad powers to the trial court to order restitution. State v. Davison, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991). Restitution is an important tool to compensate victims of crimes and for rehabilitative purposes. Fuller, 177 Wn.2d at 278. The broad interpretation of the restitution statutes is required under the statutes governing imposition of restitution in misdemeanors as well as for felonies. State v. Thomas, 138 Wn. App. 78, 81-82, 155 P.3d 998 (2007); see also Fuller, 177 Wn.2d at 277-78 (recognizing that the important public policy interests in awarding restitution are a consideration when there is no statutory limit on the imposition of restitution).

A trial court's imposition of restitution will be upheld on appeal absent an abuse of discretion. State v. Enstone, 137 Wn.2d

675, 679-80, 974 P.2d 828 (1999) (interpreting similar restitution statute of RCW 9.94A.753); Thomas, 138 Wn. App. at 82.

A sentencing court abuses its discretion only when its decision is “manifestly unreasonable or based on untenable grounds.”

Thomas, 138 Wn. App. at 82 (quoting State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999)).

Restitution must be based on easily ascertainable damages, though the amount of harm or loss need not be established with specific accuracy. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005) (interpreting RCW 9.94A.753); State v. Soderholm, 68 Wn. App. 363, 377, 842 P.2d 1039 (1993).

Evidence is sufficient to support an award of restitution if it provides a reasonable basis for estimating loss and does not require the trier of fact to rely on mere speculation or conjecture. Kinneman, 155 Wn.2d at 285; see also State v. Deskins, 180 Wn.2d 68, 82-83, 322 P.3d 780 (2014) (finding documentation sufficient to support trial court's order of restitution in misdemeanor animal cruelty sentence); State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984). The State must prove the damages by a preponderance of the evidence. Deskins, 180 Wn.2d at 82.

Restitution is allowed only for losses that are “causally connected” to the crimes charged. State v. Tobin, 161 Wn.2d at 524; Kinneman, 155 Wn.2d at 286. Losses are causally connected if “but for” the crime of which the defendant has been convicted, the victim would not have incurred the loss. Thomas, 138 Wn. App. at 82. Restitution is not limited to only victims of the charged crime, but may be awarded to any person who has suffered a loss as a result of the defendant’s crime. State v. Mark, 36 Wn. App. 428, 432-33, 675 P.2d 1250 (1984). However, the person must have suffered a loss as a result of the specific crime. Id. at 431.

Here, the sentencing court properly found that Adee’s conviction for resisting arrest was causally connected to Officer Decker’s injury. The sentencing court and the parties analyzed this case under RCW 9.94A.753, the restitution statute governing felonies. However, Adee had been convicted of a misdemeanor and his sentence deferred for 12 months, so RCW 9.95.210 governed the imposition of restitution in his case. See Fuller, 177 Wn.2d at 271; see also Marks, 95 Wn. App. at 539-40 (affirming, on different grounds than trial court, award of restitution on misdemeanor under RCW 9.92.060(2) and 9.95.210(2)). However, this Court can affirm based on any ground supported by the record.

Marks, 95 Wn. App. at 540. Further, the analysis of whether the sentencing court properly found a causal connection between Adee's crimes and Decker's injury remains the same under RCW 9.95.210. Id. at 540; Soderholm, 68 Wn. App. at 377.

The sentencing court relied on the following documents: the certification for determination of probable cause, Adee's statement on plea of guilty, the letter from the King County Prosecuting Attorney's Office's Victim Assistance Unit, and documentation from the City of Seattle concerning medical treatment and wage losses. RP 10-15; CP 4-5, 9-17, 70-83, 85.

The sentencing court found, based on the certification for determination of probable cause, that on July 27, 2014, Adee made threats to his parents, his parents were very afraid of his threats, and they felt that he was serious in his threats. RP 11; CP 4. Adee's parents relayed this information in their 911 calls to police. RP 11; CP 4-5.

Based on the information from the 911 call, officers arrived and immediately apprehended Adee. RP 11; CP 4-5. Officers feared Adee had a gun and intended to act out his threats. RP 11; CP 5. Officer Decker grabbed Adee and ordered him to the ground. CP 5. Adee refused directions, turned around with a

balled up fist and a stance appearing as if he would fight with officers. Id. The officers struggled with Adee and Adee refused to put his hands behind his back. RP 11; CP 5. During this altercation, Decker's left hand was broken. RP 11; CP 5.

The sentencing court then relied on Adee's statement on plea of guilty which was consistent with the facts from the certification for determination of probable cause. RP 12. Adee pled guilty to misdemeanor harassment and resisting arrest. CP 16. He admitted that he had threatened to cause bodily injury to Laurie Adee by sending text messages and that she was in reasonable fear that his threats would be carried out. RP 12; CP 16. Adee also admitted that he "intentionally attempted to prevent Seattle Police from lawfully arresting him. . .I attempted to pull away from Officer Decker while he was arresting me." RP 12; CP 16.

Based on these facts, the sentencing court correctly found that but for Adee's threats and actions in resisting arrest by Decker, that Decker's hand would not have been injured. See e.g. Thomas, supra. If Adee had not made threats and then resisted arrest by Decker, then Decker's hand would not have been broken. The sentencing court did not abuse its considerable discretion in finding

that the State had proved causation in fact by a preponderance of evidence and ordering Adee to pay restitution for Decker's injury.

a. The Sentencing Court Applied The Correct Legal Standard In Determining Restitution.

Adee asserts that the sentencing court did not correctly apply the causation-in-fact legal standard because Decker's injury was not a result of Adee's precise crime of resisting arrest. Br. of App. at 15. Adee relies on State v. Acevedo and State v. Woods in arguing that Decker's injury occurred before the crime. Adee's claim fails. Acevedo and Woods are easily distinguished.

In Acevedo, the defendant was convicted of possession of a stolen vehicle for possessing the remnants of a 1998 Acura. 159 Wn. App. 221, 224-25, 248 P.3d 526 (2010). At the time the Acura was found, it had no motor, transmission, wheels, or tires. Id. at 225. The Acura had been stolen from an auto body shop in perfect condition. Id. Evidence at trial showed that Acevedo had bought the Acura in the stripped condition. Id. The trial court ordered Acevedo to pay restitution for the value of the Acura at the time it had been stolen when it was in perfect condition. Id. at 226. The Acevedo court held that this was error because the damage to

the Acura occurred *before* Acevedo possessed it, therefore there was no causal connection. Id. at 230-31.

In Woods, the defendant was convicted of possessing stolen property, a motor vehicle, on September 4, 1995. 90 Wn. App. 904, 906, 953 P.2d 834 (1998). The trial court awarded restitution for personal property lost when the vehicle was stolen in August of 1995. Id. The Woods court reversed the trial court's restitution order because the victim's loss of personal property in August 1995 had not occurred due to Woods' possession of the vehicle in September 1995. Id. at 908. As the Woods court explained, "[R]estitution may be ordered only for losses incurred as a result of the precise offense charged. . . [and] cannot be imposed based on the defendant's general scheme. . ." 90 Wn. App. at 907 (quoting State v. Miszak, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993)).

By contrast, Adee's crime of resisting arrest caused Officer Decker's injury. Decker arrived on scene and immediately apprehended Adee. CP 5. Officers struggled with Adee and he refused to put his hands behind his back. Id. During this struggle to apprehend and arrest Adee, Decker's left hand was broken. Id.

Adee's crime of resisting arrest encompassed more than simply his resistance to putting his arms behind his back. Instead,

it included all of his actions from the time that officers attempted to apprehend him. Resisting arrest occurs when a person “intentionally prevents or attempts to prevent a peace officer from lawfully arresting him or her.” RCW 9A.76.040. Decker had to secure compliance from Adee by taking him to the ground in order to arrest him. CP 5. That is precisely when Decker injured his hand. Id. Thus, Adee’s crime of resisting arrest included the entire struggle by officers to secure Adee and that struggle caused Decker’s injury.

Unlike in Woods and Acevedo, Adee’s crime directly caused the injury. The struggle did not occur a month or days prior to Adee’s being secured in handcuffs. The struggle occurred *during* the arrest of Adee from the officers first approaching Adee, to then having to use force to take him to the ground, to finally securing him in handcuffs. Therefore, there was a causal connection between Adee’s crime and Decker’s injury.

b. The Documentation Sufficiently Established The Amount Of Restitution.

Adee claims that the documentation provided by the State did not establish the causal connection from Adee’s crime to the

amount of restitution because the documents were simply a summary of treatment provided, as in State v. Dennis. Adee's claim fails because the documents considered in their totality established the causal connection of Adee's crime to the amount of loss.

As stated above, the amount of loss need not be established with precise certainty. See Kinneman, 155 Wn.2d at 285. The documentation need only provide a reasonable basis to estimate the loss without resorting to speculation or conjecture. Deskins, 180 Wn.2d. at 82-83.

In State v. Dennis, the State established the loss caused by the defendant's conviction of third degree assault of Officer Dornay by the certification for probable cause, the King County Prosecuting Attorney's Office Victim Assistance Unit letter, and the City of Seattle Workers' Compensation Unit documentation. 101 Wn. App. 223, 227-28, 6 P.3d 1173 (2000).

The certification for probable cause and letter from the victim assistance unit established that Officer Dornay was treated at Northwest Hospital for his injuries. Id. at 228. The City of Seattle Workers' Compensation Unit showed that Officer Dornay had an unpaid balance for a balance they had paid to Northwest Hospital

for an injury occurring on July 30, 1997, which was the same date as the date of the assault. Id. Thus, the documentation sufficiently established the causal connection between Officer Dornay's injuries and Dennis' conviction for assault. Id. The Dennis court accepted the State's concession that restitution for the other officer assaulted by Dennis was not established because it did not have documentation for his treatment. Id. at 228.

Here, the sentencing court relied on the certification for determination of probable cause, Adee's statement of defendant on plea of guilty, the King County Prosecuting Attorney's Office Victim's Assistance Unit letter, and the City of Seattle Workers' Compensation Unit documentation. RP 10-15. The certification of probable cause established that Officer Decker broke his left hand during the struggle arresting Adee on July 27, 2012. CP 4-5. The King County Victim's Assistance Unit letter recounted that the documentation from the City of Seattle Workers' Compensation Unit were for medical expenses and time or wage losses for Officer Decker, which were incurred as a result of the incident on July 27, 2012. CP 85.

The City of Seattle Workers' Compensation documents of payment history then showed wage loss paid to Chet Decker

beginning on July 31, 2012 and continuing uninterrupted until September 17, 2012. CP 70. The medical documentation similarly showed costs incurred for treatment of Chet Decker from July 28, 2012 through September 17, 2012 and included each insurance claim form for services for Chet Decker. CP 71-83.

Given that the injury occurred July 27, 2012, the medical treatment began July 28, 2012 and the wage loss payments began only a few days later on July 31, 2012, the sentencing court reasonably inferred that all of these payments were the result of Adee's actions in causing Officer Decker's injury during his crime on July 27, 2012. RP 14-15. The sentencing court did not order restitution for wage loss from November 20, 2012 because this date was not part of the continuous period from Adee's crime and Decker's injury until Decker returned to work after September 17, 2012. RP 18-19; CP 70.

The sentencing court's conclusions logically flow from the documents provided and are strikingly similar to the conclusions based on the documents found sufficient to show a causal connection in Dennis.

The recent Washington Supreme Court case of Deskins is also instructive. In Deskins, the trial court ordered restitution for the

cost of caring for animals seized as a result of the defendant's crime of a misdemeanor violation of the cruelty to animals statute. 180 Wn.2d 75-76. The documentation showing actual amounts billed to the sheriff's office for care of the seized animals was sufficient evidence to support the restitution amount. Id. at 83. The Washington Supreme Court rejected Deskins' argument that the State had failed to prove a causal connection by presenting only a summary or list of expenses. Id. at 83-84. Instead, the Deskins court held that the State did not need to present any causal connection evidence beyond showing that it had seized the animals as a result of the defendant's crimes and incurred costs as a result. Id. at 83-84.

Here, the State presented documentation of the actual amounts billed as a result of the defendant's crime. In Deskins, similar documentation was found sufficient to support restitution. The Deskins court also rejected an argument similar to Adee's that the documents were only a summary and did not establish sufficient causal connection. This Court should reject Adee's argument that these actual bills are not sufficient.

Finally, the sentencing court did not rush, but instead heard the matter at a morning hearing and then again at an afternoon

hearing prior to determining the amount of restitution, also similar to Deskins. 180 Wn.2d at 83. Considering all of the documentation and the similarity between this case and the cases of Dennis and Deskins, both of which upheld restitution awards, the sentencing court did not abuse its discretion in finding the documents sufficient to prove the amount of restitution by a preponderance of the evidence.

c. Remand For An Evidentiary Hearing Is Not Necessary Because The Sentencing Court Considered Defense Counsel's Offer Of Proof As True.

Adee argues that this Court should remand for an evidentiary hearing so that Adee may present the evidence that his defense attorney recounted in her offer of proof. However, remand is not necessary because the sentencing court considered defense's offer of proof, yet still found the State had proven the causal connection.

If a defendant disputes material facts for purposes of restitution, then a court must either not consider those facts or hold an evidentiary hearing. State v. Dedonado, 99 Wn. App. 251, 991 P.2d 1216 (2000). An evidentiary hearing is any hearing at which evidence is presented as opposed to simply legal argument.

State v. Hughes, 154 Wn.2d 118, 211, 110 P.3d 192, 197 (2005),
abrogated on other grounds by Washington v. Recuenco, 548 U.S.
212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Here, the sentencing court considered the offer of proof and briefing of Adee's counsel as true for purposes of determining restitution. RP 14. However, the sentencing court concluded that the arrest of Adee included all of the officer's actions in apprehending him including subduing him by taking him to the ground. RP 12. Even if Adee had presented declarations or testimony that Officer Decker punched Adee to take him to the ground prior to Adee physically resisting the handcuffs it remains true that Adee's crime of resisting arrest caused Decker's injury. RP 10-15.

The sentencing court considered as true Adee's counsel's version of the facts that led to Adee's conviction for resisting arrest, yet still found the causal connection for restitution. RP 16. Adee would not be able to present any additional or new evidence that would change the sentencing court's analysis. Therefore, remand for an evidentiary hearing is unnecessary.

d. The Sentencing Court Properly Denied Adee's Request For A Continuance.

Lastly, Adee asserts that the sentencing court erred in denying his request for a continuance. Adee is incorrect. The sentencing court did not abuse its discretion in denying the request for a continuance.

A court may continue a restitution hearing for good cause. See State v. Reed, 103 Wn. App. 261, 265, 12 P.3d 151 (2000) (interpreting the restitution statute governing felonies under the Sentencing Reform Act). Good cause is defined as some external impediment not resulting from self-created hardship that prevented a party from complying with the statutory requirements. Id. n.4. Simple inadvertence or attorney oversight is insufficient. Id. A court's decision to grant or deny a continuance is reviewed for abuse of discretion. State v. Flinn, 154 Wn.2d 193, 199, 110 P.3d 748 (2005) (trial court did not abuse its discretion in granting a continuance for good cause past the time for trial period).

Here, the sentencing court concluded that Adee's attorney should have presented the additional material and declarations at the restitution hearing and denied the request for the continuance in order to obtain and present these materials. RP 16. Regardless,

the sentencing court credited the offer of proof from Adee's counsel as true. Id. Therefore, Adee did not need a continuance in order to present testimony or the in-car video because the sentencing court considered it all as proven.

Although the sentencing court and the parties mistakenly believed the 180 day time period of RCW 9.94A.753 applied to this case, the sentencing court was well within its discretion in denying Adee's request for a continuance. Adee's counsel filed briefing and knew the case quite well, therefore the sentencing court's conclusion that she could have presented the additional evidence at the hearing was not an abuse of discretion. RP 16.

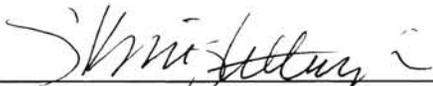
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the sentencing court's order of restitution in this matter.

DATED this 6th day of August, 2014.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Kevin March at MarchK@nwattorney.net , containing a copy of the Brief of Respondent, in STATE V.KENNETH ADEE, Cause No. 71333-7-I, 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.

U Brame
Name
Done in Seattle, Washington

8/6/14
Date 8/6/14

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