 73341-9

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Court of Appeals
Division I
State of Washington

NO. 73341-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LISA HERNANDEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Failure to challenge restitution at the trial court precludes appellate review, and a constitutional claim may not be raised for the first time on appeal unless it is manifest constitutional error, meaning it actually affected a constitutional right and had practical and identifiable consequences in the case. Hernandez pleaded guilty to third-degree assault for stabbing a man, and agreed to pay restitution in full. At a restitution hearing, the State presented itemized medical bills totaling $25,827.42. Hernandez did not challenge the constitutionality of the restitution hearing; she affirmatively agreed the medical bills were causally connected to the stabbing; and she did not contest the amount. Now Hernandez challenges the constitutionality of the hearing, the causal connection, and the amount. Is she precluded from raising these issues on appeal?

2. The Sixth Amendment does not grant a right to a jury in determining restitution, and the state constitution grants no broader protection. Hernandez pleaded guilty and agreed to pay restitution, which was set by a judge after a hearing. Was Hernandez's restitution order constitutional?

3. If a defendant disputes a restitution amount, the State must prove easily ascertainable damages by a preponderance of the evidence; estimates are allowed and mathematical certainty is not required. The State presented itemized medical bills, which listed dates and procedures for diagnoses that matched the stabbing; Hernandez agreed they were causally connected to her crime and she did not object to the amount. Did the court have sufficient evidence to set the restitution amount?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Lisa Hernandez initially was charged by Information with second-degree assault, alleging that on or about May 24, 2014, in King County, Washington, she intentionally assaulted Levi Whidden with a knife, recklessly inflicting substantial bodily harm. CP 1. On January 20, 2015, Hernandez pleaded guilty to an amended charge of third-degree assault. CP 6-21. On February 12, 2015, the trial court imposed a standard-range sentence of 60 days in jail, with credit for 30 days served and the other 30 days converted to community service, with restitution to be determined at a future hearing. CP 28-31. Hernandez filed a Notice of Appeal on March 10, 2015. On July 16, 2015, following a hearing, the court imposed

restitution in the amount of $194.16 to victim Whidden and $25,827.43 to the state Health Care Authority. CP 60.

2. SUBSTANTIVE FACTS

a. Facts Of The Crime.

Early in the morning of May 24, 2014, Hernandez stabbed Whidden once in the chest at a gas station in Renton. CP 23.[1] Medics took Whidden to Harborview Medical Center in Seattle for treatment. Id. His clothing, like his chest, was perforated and bloodied. Id. Whidden told police that he had picked up Hernandez in his car at a nearby transit center, but she had grabbed Whidden's cash and marijuana and jumped out. CP 24. When Whidden got out to stop her, she stabbed him. Id.

b. Facts Of Proceedings.

When she pleaded guilty, Hernandez stated that she caused bodily harm to Levi Whidden "by stabbing him with a knife" with criminal negligence. CP 19. Hernandez agreed to pay restitution "in full" to the victim, in an amount to be determined. CP 21. The sentencing court so ordered in the Judgment and Sentence. CP 30.

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[1] Because the case was resolved by guilty plea, the facts are drawn from the certification for determination of probable cause attached to Hernandez's guilty-plea statement. Hernandez stipulated in the plea agreement that these facts were real and material. CP 21.

At the restitution hearing on July 16, 2015, the State presented a "restitution packet" that itemized the restitution request. CP 45-59. The State sought $941.16 for Whidden, which included $747 for a pair of cowboy boots. CP 47, 55. The State sought $25,827.43 for the state Health Care Authority, and attached a three-page ledger of the various costs incurred in Whidden's care. CP 47, 56-59. For example, there was a $1,959.24 cost incurred for patient Levi Whidden on May 24, 2014, for the "Assoc. of University Physicians" to treat an "Open wound chest-compl.," including an "Incision of heart sac" and an "Exploration of abdomen." CP 57. Another cost was $22,006.27 for Harborview Medical Center to treat Whidden for a week, from May 24 to May 30, for "Inj. Int. mammary art/vein."

Hernandez did not voice any objection to the judge determining restitution. 3RP 4-12.[2] Her attorney addressed the State's medical-bill request by saying:

> Your Honor, with respect to the medical costs, the $25,827.43, I reviewed the information, the itemized list provided as part of the restitution packet. It appears to be directly related to the injury that was sustained during the incident, so I don't think the defense can object to that, because I think that the State has shown a nexus for that.

[2] The verbatim report of proceedings is divided into three individually numbered volumes that the State refers to as 1RP (January 20, 2015); 2RP (February 13, 2015); 3RP (July 16, 2015).

3RP 5-6. However, Hernandez objected to restitution for the cowboy boots, presenting photos to show that they were worn out. 3RP 8. Hernandez also objected to restitution for Whidden's clothing, saying the State lacked a sworn affidavit about value on those items. 3RP 8-9. The State acquiesced on the $747 request for the boots. 3RP 10. The court imposed restitution for Whidden's hat, underwear, sweatshirt and jeans, but not the boots. 3RP 12. It imposed the full amount of restitution for the medical bills. Id.

C. ARGUMENT

1. HERNANDEZ FAILED TO PRESERVE THESE ISSUES FOR APPEAL.

For the first time on appeal, Hernandez contends that her restitution order violated a constitutional right to have a jury determine restitution. Also for the first time on appeal, Hernandez challenges the sufficiency of the record for setting the amount of restitution to the state Health Care Authority. Hernandez may not raise these issues here. First, our supreme court has rejected her constitutional claims, so she cannot show error, let alone manifest constitutional error. Second, her failure to object at the trial court to the medical-cost restitution amount, and her affirmative agreement to the causal connection to her crime, precludes her from making

these arguments now. This Court should decline to consider her claims.

a. Hernandez's Constitutional Claim May Not Be Raised Because It Is Not A Manifest Error Affecting A Constitutional Right.

A party generally may not raise a new argument on appeal that the party did not present to the trial court. RAP 2.5; In re Det. of Ambers, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007). "No procedural principle is more familiar than that a constitutional right, or a right of any other sort, may be forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." State v. Stoddard, __ P.3d __, 32756-6-III, 2016 WL 275318, at *2 (Jan. 12, 2016) (citing United States v. Olano, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); Yakus v. United States, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944)).

The rule affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. State v. Strine, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). It also promotes judicial economy, facilitates a complete record on review, and prevents unfairness. Id. at 749-50. Without the rule, a party could simply lie back, not allowing the trial court to avoid the potential

prejudice, gamble on the verdict, and then seek a new trial on appeal. State v. Weber, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006).

An error may be raised for the first time on appeal if it is a manifest error that affects a constitutional right. RAP 2.5(a)(3). See State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). "Manifest" requires a showing of actual prejudice. Id. at 935. The defendant bears the burden to show plausibly that the asserted error had practical and identifiable consequences in the trial of the case. Id.

Hernandez cannot meet her burden. First, there was no constitutional error because our supreme court has long rejected Hernandez's constitutional arguments.[3] Second, even if she were right that she deserved a jury determination of her restitution, she cannot show any prejudice because she affirmatively agreed to a causal connection of the medical bills and did not contest the amount — 96 percent of the total requested. The court rejected the majority of the restitution that she did contest — the $747 boots.

[3] See Subsection 2 of this brief.

But it had ample evidence to order Hernandez to pay Whidden $194.16 to replace his blood-stained clothes — and Hernandez is not alleging any error in that amount now.

Hernandez cannot show error. She cannot show prejudice. She cannot show manifest constitutional error. She may not raise these claims.

b. Hernandez's Failure To Contest The Medical Restitution At The Trial Court Precludes Her Sufficiency Challenge Here.

"If the defendant disputes facts relevant to determining restitution, the State must prove the damages at an evidentiary hearing by a preponderance of the evidence." State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). But no hearing is required if the defendant acknowledges or agrees to the amount. State v. Pockert, 53 Wn. App. 491, 498, 768 P.2d 504 (1989). A failure to object to restitution constitutes an acknowledgement or agreement to the amount. State v. Ryan, 78 Wn. App. 758, 762, 899 P.2d 825 (1995).

The failure to object deprives the sentencing court of any opportunity to correct errors and to create a record that would

permit meaningful appellate review. See State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). Thus, an agreement to pay restitution and a failure to object to the amount at the trial court precludes the right to argue the sufficiency of the record on appeal. State v. Branch, 129 Wn.2d 635, 651, 919 P.2d 1228 (1996). Branch's arguments were virtually identical to Hernandez's: he pleaded guilty, agreeing to pay restitution, and did not challenge the amount at sentencing. Id. The supreme court refused to consider his sufficiency argument. Id.

Likewise, this Court should decline to consider Hernandez's challenge to the medical restitution. Hernandez argues on general principle, and "in light of the enormous cost involved," that her objection to the sufficiency of the evidence for Whidden's clothing should count as an objection to the medical bills. Appellant's Opening Brief (AOB) at 17. It does not.

Hernandez's failure to object to the medical restitution — in fact, she affirmatively agreed to the causal connection she now disputes — means the trial court was deprived of the opportunity to correct any errors and create a meaningful record for review.

See Moen, 129 Wn.2d at 547. Her affirmative agreement to the causal connection also invited the error she now claims. See State v. Young, 63 Wn. App. 324, 330, 818 P.2d 1375 (1991) (under invited-error doctrine, agreeing at the trial court that restitution should include child support precluded review); Stoddard, 2016 WL 275318, at *1 (under invited-error doctrine, agreeing to restitution precluded appellate claim that ability-to-pay inquiry was required). This Court should decline to consider Hernandez's argument now.

2. NEITHER THE FEDERAL NOR STATE CONSTITUTIONS ENTITLED HERNANDEZ TO A JURY DETERMINATION OF RESTITUTION.

For the first time on appeal, Hernandez contends that the right to trial by jury in the Sixth Amendment and article I, section 21, of the Washington Constitution entitled her to a jury determination of restitution. This claim should be rejected because the Washington Supreme Court and all circuits of the federal court of appeals have rejected this Sixth-Amendment argument, and the Washington Supreme Court has determined that article I, section 21, grants no broader protection than the Sixth Amendment when it comes to sentencing.

The United States Supreme Court has never directly addressed whether the Sixth Amendment grants defendants the right to a jury determination of the facts on which restitution is based. But the Washington Supreme Court has concluded that it does not.[4] Kinneman, 155 Wn.2d at 282.

Hernandez contends that a jury determination of restitution is required under Southern Union Co. v. United States, __ U.S. __, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), which held that Apprendi applies to the imposition of criminal fines. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). But, until the state or federal supreme courts say otherwise, this Court is bound by Kinneman's holding that Apprendi does not apply to restitution.[5] Moreover, Hernandez's argument on this point has already been rejected by the Ninth Circuit and all

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[4] All federal circuits agree. United States v. Milkiewicz, 470 F.3d 390, 403 (1st Cir. 2006) (rejecting argument that "maximum" amount of restitution based solely on fact of conviction is zero dollars); United States v. Reifler, 446 F.3d 65, 118-20 (2d Cir. 2006); United States v. Leahy, 438 F.3d 328, 337-38 (3d Cir. 2006); United States v. Day, 700 F.3d 713, 732 (4th Cir. 2012); United States v. Garza, 429 F.3d 165, 170 (5th Cir. 2005); United States v. Sosebee, 419 F.3d 451, 454, 461 (6th Cir. 2005); United States v. George, 403 F.3d 470, 473 (7th Cir. 2005); United States v. Miller, 419 F.3d 791, 792-93 (8th Cir. 2005); United States v. Bussell, 414 F.3d 1048, 1060 (9th Cir. 2005); United States v. Wooten, 377 F.3d 1134, 1144-45 (10th Cir. 2004); United States v. Williams, 445 F.3d 1302, 1310-11 (11th Cir. 2006).

[5] See State v. Pedro, 148 Wn. App. 932, 950, 201 P.3d 398 (2009) (decision by the supreme court is binding on all lower courts in the state; it is error not to follow its directly controlling authority).

other circuits that have considered the issue in light of Southern Union. United States v. Green, 722 F.3d 1146, 1149-50 (9th Cir. 2013) (holding Southern Union's extension of Apprendi does not require abandonment of prior circuit precedent that Apprendi does not apply to restitution); United States v. Bengis, 783 F.3d 407, 412-13 (2d Cir. 2015); United States v. Rosbottom, 763 F.3d 408, 420 (5th Cir. 2014), cert. denied, 135 S. Ct. 985 (2015); Day, 700 F.3d at 732; United States v. Wolfe, 701 F.3d 1206, 1216-18 (7th Cir. 2012).

Hernandez also claims Alleyne v. United States[6] undermines Kinneman, apparently under a theory that restitution is presumptively zero and thus any award raises the mandatory-minimum penalty. AOB at 7. She offers no persuasive argument for this theory. It does not follow that ordering restitution exceeds the ordinary statutory discretion afforded the sentencing court for the commission of the crime. See Alleyne, 133 S. Ct. at 2163 (the holding "does not mean that any fact that influences judicial discretion must be found by a jury" and is "wholly consistent with the broad discretion of judges to select a sentence within the range authorized by the law").

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[6] __ U.S. __, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

Like Southern Union, Alleyne was based on Apprendi. 133 S. Ct. at 2155. Hernandez does not explain why Alleyne would compel the extension of Apprendi to restitution when Southern Union does not. Furthermore, as the Ninth Circuit noted in Green, the Supreme Court itself has noted that applying the Apprendi line of cases to orders of restitution would "'cut the rule loose from its moorings.'" Green, 722 F.3d 1146 at 1149-50 (quoting Oregon v. Ice, 555 U.S. 160, 171-72, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009)).[7]

Similarly, Hernandez's lengthy analysis of United States v. Booker,[8] also a case in the Apprendi line, is a dead letter because Kinneman squarely held that restitution "does not require jury fact-finding under" Booker. Kinneman, 155 Wn.2d at 281. Basically, Hernandez's entire argument is that our supreme court is wrong.

Still, Hernandez also contends that article I, section 21, of the state constitution independently provides a right to a jury determination of restitution because it is the same as civil damages. This argument is similarly ill-founded, as the Washington Supreme Court has held that article I, section 21, does not provide any

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[7] Alleyne was decided June 17, 2013, and Green was filed July 11, 2013.

[8] 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

broader protection than the Sixth Amendment in the context of sentencing. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003).

Hernandez relies on Sofie v. Fibreboard Corp.[9] and its conclusion that article I, section 21, provides for the jury determination of damages in a civil suit, yet that holding turned on the supreme court's determination that the measure of damages in a civil suit was traditionally within the jury's province at the time the Washington State Constitution was enacted. Sofie, 112 Wn.2d at 645-46.

"Restitution is not a substitute for a civil lawsuit" but rather serves purposes as part of the punishment scheme. State v. Fleming, 75 Wn. App. 270, 275, 877 P.2d 243 (1994), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). Criminal sentencing was not within the jury's province at the time the state constitution was enacted. Smith, 150 Wn.2d at 154, 156. Therefore, neither Sofie nor any other source provides justification for finding a constitutional right under article I, section 21, to a jury determination of restitution.

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[9] 112 Wn.2d 636, 771 P.2d 711 (1989).

Because this Court is bound by Kinneman's holding that there is no Sixth Amendment right to a jury determination of restitution, and because article I, section 21, does not provide any broader protection in the context of sentencing, Hernandez can show no error, and this Court should reject her argument.

3. THE RECORD WAS SUFFICIENT TO SET THE RESTITUTION AMOUNT.

The trial court's power to impose restitution is derived solely from statute. State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999). Where the trial court has authority to order restitution, it has discretion to determine the amount. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Its decision will be overturned only for an abuse of discretion. Id. A court abuses its discretion when the restitution decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Enstone, 137 Wn.2d at 679-80.

RCW 9.94A.753(5) provides, "Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property...." Costs that a victim incurs as the result of a defendant's crimes have been determined a loss of property under the restitution statute.

State v. Tobin, 161 Wn.2d 517, 526-27, 166 P.3d 1167 (2007). "There must be a causal connection between the damages claimed and the crime charged," but that means only "that 'but for' the crime, the damages would not have occurred." Id. at 527.

"If a defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence." State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). The amount of restitution must be based on "easily ascertainable" damages, meaning tangible damages supported by sufficient evidence. RCW 9.94A.753(3); State v. Tobin, 132 Wn. App. 161, 173, 130 P.3d 426 (2006), aff'd, 161 Wn.2d 517, 166 P.3d 1167 (2007). Estimates are allowed. Id. at 174. Once the State establishes the fact of damage, "the *amount* need not be shown with mathematical certainty." State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984) (emphasis in original). The evidence must be sufficient to provide a reasonable basis for estimating loss. State v. Pollard, 66 Wn. App. 779, 785, 834 P.3d 51 (1992). Evidence that subjects the trier of fact to speculation or conjecture is insufficient. Id.

At the trial court, Hernandez agreed that there was a causal connection between the medical bills and the stabbing, and she

took no umbrage with the amount. Nonetheless, she now contends that the records submitted to the trial court were insufficient to establish a causal connection, and were speculative.[10]

To the contrary, the ledger of expenses came with a letter signed by an official at the Health Care Authority that stated the claim originated from the treatment of Levi Whidden for an injury incurred on May 24, 2014. The ledger itself listed specific procedures and services on or immediately after the same date with specific diagnoses that matched the nature of the stabbing. As Hernandez herself conceded to the trial court, there was ample information in the record to establish the causal connection. And the dollar amounts were far from speculative, down to the pennies.

Still, Hernandez now cites to State v. Dennis, 101 Wn. App. 223, 6 P.3d 1173 (2000), and State v. Bunner, 86 Wn. App. 158, 936 P.2d 419 (1997), to assert that this documentation was insufficient because it was a mere "summary of medical treatment that does not indicate why the services were provided." AOB at 16. First, that is false, because the documentation says exactly why they were provided — Whidden's "open wound of chest," his

[10] Hernandez does not challenge sufficiency of the evidence for the $194.16 awarded to victim Whidden.

"pulmonary collapse" and his "Inj. Int. mammary art./vein" on the day Hernandez stabbed him. CP 57-59. Second, Dennis and Bunner are quite distinguishable.

In Dennis, the defendant was ordered to pay restitution for assaulting police officers, but the only evidence the State presented regarding one of the officers showed that he was treated at a hospital for injuries on an unknown date. 101 Wn. App. at 225. In Bunner, the defendant was ordered to pay restitution for raping a child. 86 Wn. App. at 159. The sole evidence at the hearing was a medical report listing general services, such as counseling over a period of time, and amounts the State had paid for those services, but nothing indicating the services were related to the rape. Id. Here, the ledgers listed the date, place, type of injury, and type of procedure, all of which matched the facts of Hernandez's crime.

Hernandez pleaded guilty to causing bodily harm to Whidden on May 24, 2014, by "stabbing him with a knife." CP 19. She stipulated to the facts set forth in the certification for determination of probable cause, including that Whidden was stabbed in the chest and was taken to Harborview for treatment. CP 23. The State amply proved the causal connection (and Hernandez agreed), and it established the fact of the damage by the required

preponderance standard. Even if Hernandez were not procedurally barred from raising this claim here, it resoundingly fails.

Lastly, Hernandez contends that if the State did not meet its evidentiary burden for the medical restitution, the order should be stricken. That would be improper here, where Hernandez conceded a causal connection at the restitution hearing she now challenges. Dennis supports vacation without remand when the State fails to establish a causal connection because of time bars. 101 Wn. App. at 229. But when the issue is insufficient evidence of the amount, our supreme court requires remand to properly determine the amount. State v. Griffith, 164 Wn.2d 960, 967-68, 95 P.3d 506 (2008).

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Hernandez's restitution order.

DATED this 19th day of February, 2016.

Respectfully submitted,

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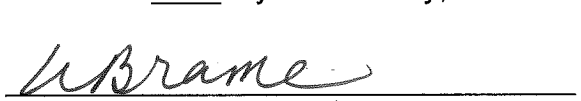
Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to David Donnan, the attorney for the appellant, at David@washapp.org, containing a copy of the BRIEF OF RESPONDENT in State v. Lisa Dawn Hernandez, Cause No. 73341-9, 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.

Dated this 19th day of February, 2016.



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