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Supreme Court No. 100982-8
(COA No. 55930-7-II)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY GIBBERMAN,

Petitioner.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF WASHINGTON DIVISION TWO

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES.....ii

TABLE OF AUTHORITIES CONT'D iii

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUE PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT 5

 1. THE COURT OF APPEALS IMPROPERLY
 AFFIRMED A RESTITUTION ORDER BASED ON
 GROUNDS NOT AUTHORIZED WITHIN THE
 RESTITUTION STATUTE..... 5

F. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

<i>State v. Dauenhauer</i> , 103 Wn. App. 373, 12 P.3d 661 (2000).....	11
<i>State v. Deskins</i> , 180 Wn.2d 68, 322 P.3d 780 (2014)	7
<i>State v. Gray</i> , 174 Wn.2d 920, 280 P.3d 1110 (2012)	6
<i>State v. Kinneman</i> , 155 Wn.2d 272, 119 P.3d 350 (2005)	8, 9, 10, 12
<i>State v. Larson</i> , 184 Wn.2d 843, 365 P.3d 740 (2015)	7
<i>State v. Smith</i> , 119 Wn.2d 385, 831 P.2d 1082 (1992)	9
<i>State v. Tobin</i> , 161 Wn.2d 517, 166 P.3d 1167 (2007)	8, 9, 10, 12
<i>State v. Vinyard</i> , 50 Wn. App. 888, 751 P.2d 339 (1988).....	10

Statutes

RCW 9.94A.735(3).....	6, 7
RCW 9.94A.735(5).....	6, 7

TABLE OF AUTHORITIES CONT'D

Rules

RAP 13.4(b)(1)..... 1, 6, 12

RAP 13.4(b)(4)..... 1, 6, 12, 13

A. IDENTITY OF PETITIONER

Mr. Gibberman, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.4(b)(1) and 13.4(b)(4).

B. COURT OF APPEALS DECISION

Mr. Gibberman seeks review of the Court of Appeals decision dated February 3, 2022, a copy of which is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

Restitution is only authorized when the defendant's criminal conduct causes injury to a person or damage to or loss of property. Restitution cannot include damages for mental anguish, pain and suffering, or other intangible losses. Ms. Decker, the victim, moved her family to an on-base hotel more than a week after the last criminal conduct despite Mr. Gibberman having been arrested, served with an anti-harassment order, and no other criminal activity

during the intervening period. Should this Court grant review to determine whether the Court of Appeals correctly holds hotel expenses can be properly included within a restitution order when there is no evidence in the record of future criminal conduct; the expenses were based on the victim's subjective loss sense of security; and the expenses were incurred approximately a week after the criminal conduct?

D. STATEMENT OF THE CASE

Over the course of approximately two days, Mr. Jeffrey Gibberman sent numerous threatening text messages to his former supervisor, Ms. Carmen Decker. In several of the various messages, Mr. Gibberman threatened to kill Ms. Decker and her family at their family residence. In another message, Mr. Gibberman told Ms. Decker he had hired individuals to kill her and her family at their residence. RP 34. Ms. Decker reported the message to law enforcement who subsequently arrested Mr.

Gibberman and served an anti-harassment order. RP 11, 15; CP 46. Mr. Gibberman complied with the order. RP 11, 22; CP 45-6. The record demonstrates Mr. Gibberman's last threatening message was sent and received on October 17, 2020. RP 6.

On October 19, 2020, and for nearly a week afterwards, Ms. Decker received armed security around her residence. RP 11; CP 46. On October 23, 2020, Ms. Decker moved her family into an on-base hotel. Ms. Decker later explained she was unable to move sooner because her son requires ADA living accommodations. RP 27, 29. Initially, Ms. Decker obtained one hotel room but then obtained a second because her "son's caretaker and my family, all on different schedules in one room was very difficult to sustain, and we got a second room." Restitution Packet pg. 4 (filed February 23, 2021).

Mr. Gibberman was charged with, and pled guilty to, two counts of felony harassment under RCW

9A.46.020(2)(b). CP 1. A contested restitution hearing was subsequently held.

The trial court ordered restitution for Ms. Decker's hotel expenses noting that the case was a close call. RP 26. The trial court highlighted the victims were emotionally affected by Mr. Gibberman's criminal conduct. The court ruled the causal connection was satisfied because the victim was fearful based on the defendant's criminal conduct and that the victim's fears were understandable. RP 28-9.

Additionally, the court noted that Mr. Gibberman indicated to the victim he knew where she lived. RP 29. Furthermore, the court found, by a preponderance of the evidence, the damages were easily ascertainable based on Ms. Decker's documentation for expenses. RP 29-30. Specifically, \$98.98 for the anti-harassment order, \$2,062.05 for one of the hotel room costs, and \$1,145.04

for the additional hotel room costs. RP 29. The final cost was \$3, 306.07.

The Court of Appeals affirmed the restitution order holding that Ms. Decker's expenses were causally connected to Mr. Gibberman's criminal conduct. OP at 3. Specifically, the Court stated that even though all criminal activity had ceased there was still a possibility "that Gibberman or his friends might attempt to kill Decker and her son in their home." OP at 3. The Court of Appeals also held Ms. Decker's second hotel room expenses were not too attenuated because "Decker stated that she needed two rooms to accommodate her son and his caregiver."

This timely petition follows.

E. ARGUMENT

1. THE COURT OF APPEALS IMPROPERLY AFFIRMED A RESTITUTION ORDER BASED ON GROUNDS NOT AUTHORIZED WITHIN THE RESTITUTION STATUTE.

This Court should grant review to decide whether voluntary expenses incurred based on the victim's

subjective loss sense of security can be properly included within a restitution order under RAP 13.4(b)(1) and 13.4(b)(4).

Restitution is only authorized by statute. *State v. Gray*, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012). Under RCW 9.94A.735(3) “restitution ordered by a court pursuant to a criminal conviction shall 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.” That same subsection also limits what cannot be included within a restitution order

Restitution shall not include reimbursement for damages for **mental anguish, pain and suffering, or other intangible losses...**

Id. (emphasis added).

Under RCW 9.94A.735(5) “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...” The 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.” Thus, restitution must be casually connected and not too attenuated.

Review of a trial courts restitution order is for an abuse of discretion. *State v. Deskins*, 180 Wn.2d 68, 77, 322 P.3d 780 (2014).

The plain language of the restitution statute only grants authority to order restitution where the victim suffers personal injury, or damage to or loss of property, treatment for injury, or lost wages. RCW 9.94A.735(3); RCW 9.94A.735(5); *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015) (the plain language of the statute is “the surest indication of legislative intent.”). Subsequent limiting language within same subsections supports the conclusion that these categories are the only categories the trial court

can order restitution. Courts do not “engage in overly technical construction that would permit the defendant to escape from just punishment.” *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007).

The Court of Appeals in Mr. Gibberman’s case announced that “[r]estitution can be based on funds the victim expends as a result of the crime.” OP at 3 (citing *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) citing *State v. Kinneman*, 155 Wn.2d 272, 119 P.3d 350 (2005)). In the context of Mr. Gibberman’s case, *Tobin* and *Kinneman* do not stand for such a broad proposition, in light of the plain language of the statute.

In *Tobin*, the defendant perpetrated expansive ecological crimes by illegally harvesting crab, geoduck, other shellfish, and selling the merchandise to others. *Tobin*, 161 Wn.2d at 520-21. The State subsequently incurred expenses investigating, managing, and

prosecuting the case and sought to collect these expenses in restitution. *Tobin*, 161 Wn.2d at 521, 527.

This Court affirmed the restitution order stating that “[f]unds expended by a victim as a direct result of the crime (whether or not the victim is an ‘immediate’ victim of the offense) can be a loss of property on which restitution is based.” *Tobin*, 161 Wn.2d at 524 (quoting *Kinneman*, 155 Wn.2d at 287); citing *State v. Smith*, 119 Wn.2d 385, 831 P.2d 1082 (1992)). After a survey of Washington restitution cases, this Court held “costs that a victim incurs as the result of the defendant’s crimes have been deemed a loss of property under the restitution statute...” *Tobin*, 161 Wn.2d at 526-27.

In *Kinneman*, the defendant committed fraud and various financial crimes including diverting over \$200,000 for his own personal use. *Kinneman*, 155 Wn.2d at 276. The defendant was later convicted on 67 counts of theft. *Id.* Restitution was ordered, however, the trial court

declined to order restitution for attorney fees later incurred by victims to pursue legal action to collect the stolen funds. *Kinneman*, 155 Wn.2d at 277, 286-87.

This Court noted that “[a]ttorney fees and costs may constitute damages on which restitution may be based, depending on the circumstances.” *Kinneman*, 155 Wn.2d at 288 In doing so, this Court rearticulated that the fees still must be sufficiently causally connected to the offense. *Id.* (citing *State v. Vinyard*, 50 Wn. App. 888, 894, 751 P.2d 339 (1988)).

Read together, *Tobin* and *Kinneman* demonstrate that funds expended by victims may be properly included within the restitution order so long as the expenses address one of the identified categories authorized under the restitution statute. In *Tobin*, the underlying property damage was the ecological theft of various sea life and future damages. In *Kinneman*, the underlying property was monies the defendant stole. In both cases, the underlying

injury fell within one of the identified categories of the restitution statute and the subsequent expenses were incurred addressing those injuries.

In contrast to those cases, Ms. Decker's injury was her subjective loss sense of security. Ms. Decker's hotel expenses were incurred approximately a week after the last criminal act. *State v. Dauenhauer*, 103 Wn. App. 373, 12 P.3d 661 (2000) (mere connection between expenses and criminal conduct is not enough). During that intervening period there was no other criminal conduct by Mr. Gibberman. Moreover, Mr. Gibberman's conduct did not directly force Ms. Decker to leave her home. Although frightening, Mr. Gibberman's words did not physical restrain Ms. Decker from continuing to reside in her home. As the superior court noted in its ruling, a component of Ms. Decker's expenses were based off emotion, an intangible feeling.

Whether the trial court can order restitution for expenses voluntarily incurred based on the victim's subjective loss sense of security, more than a week after the criminal conduct in which that criminal conduct did not directly cause the expense is a matter of public importance. RAP 13.4(b)(4). The plain language of the restitution statute limits restitution to actual injuries or damages suffered as a direct result of the defendant's criminal conduct. In affirming the trial court's restitution order in Mr. Gibberman's case, the Court of Appeals has expanded the circumstances in which restitution can be granted, improperly expanding *Tobin* and *Kinneman*. This Court must grant review under RAP 13.4(b)(1) and (4) to determine under what non-injury circumstances can the trial court grant restitution for voluntary expenses.

F. CONCLUSION

Based on the foregoing, petitioner Mr. Gibberman respectfully requests that review be granted pursuant to RAP 13.4(b)(1) and 13.4(b)(4).

DATED this 1st day of June 2022.

I, Kyle Berti, in accordance with RAP 18.7, certify that this document is properly formatted and contains 1722 words.

Respectfully submitted,



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I, Kyle Berti, a person over the age of 18 years of age, served the Pierce County Prosecutor (kristie.barham@piercecounitywa.gov; PCpatcecf@piercecounitywa.gov) and Jeffrey Gibberman, a true copy of the document to which this certificate is affixed on (6/1/2022). Service was made by electronically to the prosecutor, and to Jeffrey D. Gibberman by depositing in the mails of the United States of America, properly stamped and addressed.



KYLE BERTI
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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON May 3, 2022

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY DANIEL GIBBERMAN,

Appellant.

No. 55930-7-II

UNPUBLISHED OPINION

MAXA, J. – Jeffrey Gibberman appeals the trial court’s restitution order following his guilty plea to two counts of felony harassment. He argues the trial court erred by ordering restitution for the victim’s hotel expenses that were incurred after Gibberman threatened to kill the victim and her son at the victim’s home.

We hold that the trial court did not err in ordering restitution because the hotel expenses were causally connected to Gibberman’s crimes and were not too attenuated. Accordingly, we affirm the trial court’s restitution order.

FACTS

On October 16 and 17, 2020, Gibberman sent numerous threatening text messages to his former boss, Carmen Decker. Gibberman was arrested and booked into jail on October 19. The State charged Gibberman with two counts of felony harassment, with one count including a vulnerable person aggravator. Gibberman pleaded guilty to both counts.

One of Gibberman’s texts to Decker stated, “I have friends . . . that are going to kill you. I already paid them so watch your back. You will be dead, you and your son.” Report of Proceedings (RP) (Mar. 16, 2021) at 17. Gibberman also made detailed threats to kill Decker

and her son at their home, and later sent a text that consisted only of the home's address. Another text stated, "Are you scared that I might be where you live right now, right outside your apartment where you park your car, with a full bucket of gasoline and match? Are you scared about that? What if you burn down tonight? Are you scared?" RP (Mar. 16, 2021) at 18. After Gibberman was arrested, Decker moved into two hotel rooms with her family.

The State requested restitution, which included Decker's hotel expenses. At the restitution hearing, the parties agreed that the trial court could consider the statements Decker made at sentencing. The State also submitted an exhibit containing a written statement from Decker and receipts for the hotel rooms totaling \$3,207.09.

Decker stated that she needed to leave her home because of Gibberman's threats. Decker could not stay with family or friends because her son was in a wheelchair; instead, she needed a hotel room that complied with Americans with Disabilities Act standards. It took her a few days to find an appropriate hotel. Decker moved into a hotel room with her family on October 23. She obtained a second hotel room to accommodate her family, including her son's caregiver, and their schedules.

The trial court ordered Gibberman to pay \$3,306.07 in restitution, which included \$3,207.09 in hotel room expenses. Gibberman appeals the court's restitution order.

ANALYSIS

A. LEGAL PRINCIPLES

The trial court's authority to order restitution derives from statutory provisions. *State v. Gray*, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012). RCW 9.94A.753(5) states, "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" absent extraordinary circumstances. Under RCW

9.94A.753(3), restitution “shall 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.” Restitution can be based on funds the victim expends as a result of the crime.

State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007).

Restitution can be ordered only for losses that are causally connected to the defendant’s offense. *Id.* at 524. The State must show that but for the offense, the losses would not have occurred. *Id.* at 524, 527. Proof of expenditures is not necessarily sufficient to show a causal connection “because it is often not possible to determine from such documentation whether all the costs incurred were related to the offender’s crime.” *State v. Dennis*, 101 Wn. App. 223, 227, 6 P.3d 1173 (2000).

We review a trial court’s restitution order for an abuse of discretion. *State v. Deskins*, 180 Wn.2d 68, 77, 322 P.3d 780 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

B. CAUSAL CONNECTION

Gibberman argues that Decker’s hotel expenses were not causally connected to his crimes because she moved to the hotel after his criminal conduct occurred. We disagree.

Gibberman sent numerous threatening text messages to Decker. The texts specifically included threatening to kill Decker and her son in their home and burning down the home. Further, Gibberman stated that he had paid friends to kill Decker. The fact that Gibberman was arrested and the texts stopped did not eliminate the possibility that Gibberman or his friends might attempt to kill Decker and her son in their home later. And Decker stated that she needed to leave her home because of Gibberman’s threats. The trial court did not abuse its discretion in concluding that but for the threats, Decker would not have incurred the hotel expenses.

Gibberman also argues that the expense of the second hotel room was too attenuated. However, Decker stated that she needed two rooms to accommodate her son and his caregiver. The trial court did not abuse its discretion in including the second hotel room in the restitution amount.

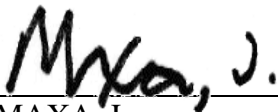
Finally, Gibberman cites three cases in which restitution was denied based on a lack of causal connection: *State v. Blanchfield*, 126 Wn. App. 235, 108 P.3d 173 (2005); *State v. Dauenhauer*, 103 Wn. App. 373, 12 P.3d 661 (2000); and *State v. Vinyard*, 50 Wn. App. 888, 751 P.2d 339 (1988). But those cases are distinguishable on their facts.

We hold that the trial court did not err in including the hotel expenses in the restitution order.

CONCLUSION

The trial court did not abuse its discretion by including Decker's hotel expenses in its restitution order. Accordingly, we affirm the trial court's restitution order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



MAXA, J.

We concur:



GLASGOW, C.



PRICE, J.

LAW OFFICES OF LISE ELLNER

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Transmittal Information

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