NO. 73542-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN VELEZMORO,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable John Chun, Judge

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# AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in ordering the appellant to pay restitution absent a showing of but-for causation of harm.

2. The court erred in ordering a restitution amount based on speculation and conjecture.

Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion in awarding restitution absent a showing that the losses would not have accrued "but for" the appellant's acts?

2. Did the trial court abuse its discretion in entering a restitution amount that appears to have been plucked from the ether?

B. STATEMENT OF THE CASE

The State charged John Velezmoro with first degree possession of depictions of minors engaged in sexually explicit conduct[1] between April

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[1] Under RCW 9.68A.070:

> (1)(a) A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first degree when he or she knowingly possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9. 68A.011(4) (a) through (e).
>
> (b) Possession of depictions of a minor engaged in sexually explicit conduct in the first degree is a class B felony punishable under chapter 9A.20 RCW.

9 and May 21, 2013. CP 1-13. He later pleaded to the second degree of that offense after the State reduced the charge. CP 14-48; Supp. CP ___ (sub no. 40, amended information). The charge was reduced because it had been determined that Velezmoro was amenable to treatment. RP 2. The court sentenced Velezmoro to three months of incarceration and ordered restitution in an amount "to be determined." CP 51.[2]

Among the images found in Velezmoro's possession were seven images of a child victim known to the National Center for Missing and Exploited children as "Vicky." RP 3; CP 60 (State's restitution memorandum). Vicky, now in her 20s, acting through a Washington

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> (c) For the purposes of determining the unit of prosecution under this subsection, each depiction or image of visual or printed matter constitutes a separate offense.
>
> (2)(a) A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the second degree when he or she knowingly possesses any visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g).
>
> (b) Possession of depictions of a minor engaged in sexually explicit conduct in the second degree is a class C felony punishable under chapter 9A. 20 RCW.
>
> (c) For the purposes of determining the unit of prosecution under this subsection, each incident of possession of one or more depictions or images of visual or printed matter constitutes a separate offense.

[2] In the plea agreement, Velezmoro agreed to pay restitution "to include medical and counseling expenses." CP 41.

attorney, sought $5,000 in restitution from Velezmoro for losses based simply on his possession of the images. CP 60-65 (State's restitution memorandum); CP 68-398 (documents considered for restitution hearing, submitted by Vicky's attorney Carol Hepburn).

In seeking restitution, Vicky's attorney relied primarily on a case from the United States Supreme Court, Paroline v. United States, ___ U.S. ___, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014). The case involved similar facts[3] but dealt with a specialized federal statute requiring restitution in the context of offenses involving the sexual exploitation of children, including offenses related to child pornography.[4] The attorney acknowledged that the general Washington restitution statute allows recovery for a narrower category of losses than does the federal statute, but she nonetheless argued the court should order restitution. CP 70.

The attorney initially requested $5,000 from Velezmoro in a February 24, 2015 letter to Velezmoro's attorney. CP 69. The letter explains the request as follows:

> Our request is for an apportioned amount of Vicky's documented economic losses, which are documented at

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[3] Paroline pleaded guilty to possessing between 150 and 300 images of child pornography, which included two that depicted a single child, "Amy," who, as an adult, sought restitution from Paroline under the special federal restitution statute. Paroline, 134 S. Ct. at 1716.

[4] 18 U.S.C. § 2259, attached as Appendix A.

> $246,658.00. This is comprised of $113,600.00 in counseling expenses, $20,148.00 in educational and vocational counseling needs, and $112,910.00 in lost earnings. . . . We believe that Mr. Velezmoro should contribute $5,000.00 to the costs of her recovery.

CP 69. The larger amounts were based on the legal theory that, due to Vicky's emotional disturbance from the knowledge that her images continued to be circulated, she required ongoing mental health counseling. CP 72. These psychological effects had negatively affected her secondary and post-secondary education and delayed her entry into the work force. Moreover, she argued, the emotional disturbance could affect her future earning prospects.[5] CP 69-70, 73-79. The letter asserts that Velezmoro is part of the "global market" for child pornography, CP 79, but does not claim the Vicky was specifically aware of the charges against Velezmoro. CP 73-77.

Vicky's attorney also submitted a letter to the court on April 29, 2015. CP 83. The letter acknowledges that Velezmoro had argued that

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[5] Attached to the attorney's letters were victim impact statements submitted by Vicky and her family in previous, unrelated, cases (CP 130-45); a series of psychological evaluations assessing the impact of Vicky's psychological disturbances on her ability to function in school and in the workplace, including the most recent April 2014 evaluation (CP 147-228); a "vocational assessment" relying on the psychological evaluations (CP 245-58); an economist's estimate of Vicky's past and future lost wages through retirement assuming she continued on her chosen career path (CP 265-308); examples from online fora indicating the "Vicky" series of images continued to be a topic of prurient interest online (CP 321-74); and finally, two separate copies of the Paroline case (CP 91-128, 376-98).

only post-offense losses should be considered, that is, losses incurred after April of 2013. The attorney calculates a total of $183,819.00 for counseling costs and lost wages. CP 83-84. The letter then offers the following calculation to justify a continued request for $5,000.00, the same amount requested in the initial letter:

> If we compare the lesser [post-April 2013] figure of post offense counseling costs and post offense past lost wages allowable in Washington ($183,819.00) to the larger figure allowable under [18 U.S.C. § 2259] ($1,084,053.29) the pro rata amount is 17%. Applying this to [the amount of restitution Vicky had received to date, or $692,548.94] yields an amount of $117,733.32 having been received against the Washington restitution amount[6] and net losses of $66,085.68 remaining to be compensated.

CP 84.

The court conducted a hearing on restitution on May 1, 2015. At the hearing, the State argued $5,000 in restitution should be imposed but largely deferred to attorney Hepburn. RP 3.

Hepburn argued that the court should follow the causation rationale espoused in the Paroline case, RP 10, and that $5,000 was a "reasonable" figure, reiterating calculations set forth in the letters. RP 3-5, 12.

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[6] As argued below, nothing in the letter explains why the fact that a Washington court might, under different circumstances, allow such an amount makes this a relevant figure. Clearly, no single perpetrator was the sole cause of the harm, and not everyone who has viewed or may view the images is from Washington.

In contrast, Velezmoro's attorney argued that "causation" was determined in a different manner under the federal restitution statute and the State had failed to show a "but-for" causal connection, required by Washington law, between Velezmoro's crime and any losses. RP 5-7, 9. He argued, moreover, that lost wages claimed were akin to future lost wages, prohibited under State v. Lewis, 57 Wn. App. 921, 791 P.2d 250 (1990).[7] RP 6. In addition, Vicky had already received over $600,000 in restitution, which more than covered her counseling expenses, most of which had, in any event, been covered by medical insurance. RP 8-9.

The parties agreed, however, that there was no Washington case involving identical facts. RP 12-13.

The court stated that it agreed with Hepburn's arguments that Velezmoro was part of a global internet "marketplace" that created a demand for child pornography. The court therefore ordered the amount of restitution requested by Vicky's attorney. RP 13-14. Velezmoro's

[7] In Lewis, the victim, Primacio, was killed in a car crash. Lewis, 57 Wn. App. at 922. This Court held that the Washington restitution statute did not authorize the award of a lump sum payment of $50,000 for the future earnings of Primacio. Id. at 922-23. The amount was not "easily ascertainable" because an award of lost future earnings typically requires expert testimony and must take into account such factors as the victim's "health, life expectancy, job security, possibilities for advancement, and the appropriate discount and inflation factors for determining the present value of the future wages." Id. at 924. Moreover, because the legislature used the past tense in the language "lost wages," the restitution statute only applied to wages "already incurred." Id. at 926.

attorney questioned the court regarding how it had arrived at the $5,000 figure. RP 13. The court responded that Vicky still had uncompensated costs but acknowledged "[m]athematically precise, it's not." RP 14.

Velezmoro timely appeals. CP 399-403.

C. ARGUMENT

1. THE COURT ABUSED ITS DISCRETION IN ORDERING RESTITUTION ABSENT A SHOWING OF BUT-FOR CAUSATION AND IN SETTING A RESTITUTION AMOUNT BASED ON SPECULATION AND CONJECTURE.

A court may impose restitution only as authorized by statute. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). RCW 9.94A.753(3) provides that restitution "shall be based on easily ascertainable damages for injury to or loss of property."[8] While the claimed loss "'need not be established with specific accuracy,'" it must be supported by "substantial credible evidence." State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (quoting State v. Fleming, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994)). Evidence supporting restitution is sufficient if it provides a reasonable basis for estimating loss and does not require the court to base its award on speculation or conjecture. Griffith, 164 Wn.2d at 965. If a defendant disputes the restitution amount, the State

[8] RCW 9.94A.753, the applicable restitution statute, is attached as Appendix B.

must prove the amount by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

A trial court's order of restitution will not be disturbed on appeal absent an abuse of discretion. Enstone, 137 Wn.2d at 679. Application of an incorrect legal analysis or other error of law, however, constitutes an abuse of discretion. Kinneman, 155 Wn.2d at 289. A court also abuses its discretion when it resolves a matter on untenable grounds or for untenable reasons. State v. Ring, 134 Wn. App. 716, 719, 141 P.3d 669 (2006) (citing Enstone, 137 Wn.2d at 679-80). This Court may not invoke the permissive doubling provision under RCW 9.94A.753(3) to uphold an otherwise erroneous restitution amount. Griffith, 164 Wn.2d at 966.

a. "Vicky" is not entitled to recovery under the Washington restitution statute because, unlike under the federal statute, "but-for" causation is required.

Absent a defendant's express agreement to pay more, restitution is allowed only for losses "'causally connected'" to the crime the accused was actually convicted of. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (quoting Kinneman, 155 Wn.2d at 286); State v. Thomas, 138 Wn. App. 78, 82, 155 P.3d 998 (2007); State v. Woods, 90 Wn. App. 904, 908, 953 P.2d 834 (1998). For restitution to be permitted under the statute, the State must establish by a preponderance of the evidence that the victim's loss would not have occurred "but for" the crime in question.

State v. Harris, 181 Wn. App. 969, 974, 327 P.3d 1276 (2014) (citing Thomas, 138 Wn. App. at 82), review denied, 181 Wn.2d 1031 (2015). "But for" causation, or "cause in fact," means that the act in question produced consequences in a direct unbroken sequence which would not have resulted had the act not occurred. Hertog, ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999). The necessary causal connection is not established simply because the victim or his or her insurer can submit a list of specific expenditures. State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000).

Here, there is no evidence before the court that "Vicky" was aware of Velezmoro's possession of her image or that he interacted with the producer of the images. See CP 73, 79-80 (generic discussion, in Hepburn letter, of harms suffered by Vicky); RP 5 (Velezmoro's attorney's assertion, not contradicted by Hepburn, that Vicky was not specifically aware of Velezmoro's conduct). There was also no evidence that, had Vicky been aware of *Velezmoro's* possession of her image, she would have experienced the distress described in the materials. As a result, the State failed to demonstrate that Velezmoro's specific crime of possessing the images in April and May of 2013 was a cause in fact of Vicky's distress, or of any resulting economic losses.

Paroline, which the sentencing court seems have relied upon, is of no assistance to the State. In Paroline, based on similar facts, the Supreme Court stated that the federal restitution statute permitted recovery of a portion of—but not all of—a victim's total losses.[9] As Vicky's attorney argued below, the Supreme Court required a causal link between the crime and the loss. However, the attorney failed to point out that the Paroline Court eschewed a stricter but-for causation requirement:

> *The traditional way to prove that one event was a factual cause of another is to show that the latter would not have occurred "but for" the former.* This approach is a familiar part of our legal tradition, . . . and no party disputes that a showing of but-for causation would satisfy § 2259's factual-causation requirement. Sometimes that showing could be made with little difficulty. For example, but-for causation could be shown with ease in many cases involving producers of child pornography, see § 2251(a); parents who permit their children to be used for child-pornography production, see § 2251(b); individuals who sell children for such purposes, see § 2251A; or the initial distributor of the pornographic images . . . , see § 2252.

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[9] The Paroline Court explicitly rejected the victim's claim that each possessor of images could be held liable for the full amount of loss under the federal statute:

> The reality is that the victim's suggested approach would amount to holding each possessor of her images liable for the conduct of thousands of other independently acting possessors and distributors, with no legal or practical avenue for seeking contribution.

Paroline, 134 S. Ct. at 1725-26.

> *In this case, however, a showing of but-for causation cannot be made.*

Paroline, 134 S. Ct. at 1722 (emphasis added). The Court nonetheless determined that some recovery should be permitted under the statute based on an "alternative" and "less demanding" theory of causation:

> [A]lternative causal tests are a kind of legal fiction or construct. If the conduct of a wrongdoer is neither necessary nor sufficient to produce an outcome, that conduct cannot in a strict sense be said to have caused the outcome. Nonetheless, tort law teaches that alternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes.

Paroline, 134 S. Ct. at 1724.

Paroline is of no assistance to the State because it interprets a specialized federal statute with an alternative concept of causation. In other words, although Paroline is a Supreme Court decision, it did not purport to set forth a mandatory, nationwide minimum causation standard for cases of this type. The trial court here was operating under the Washington statute, which requires something distinct. See State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991) (court's authority to impose restitution derives entirely from statute).

Because the State has not proven but-for causation, a necessary prerequisite to recovery under the general Washington restitution statute, the restitution order must be reversed. Harris, 181 Wn. App. at 974.

b. The amount imposed by the court is the result of speculation and conjecture.

Evidence supporting restitution is sufficient only if it provides a reasonable basis for estimating loss and does not require the court to base its award on speculation or conjecture. Griffith, 164 Wn.2d at 965.

Vicky's attorney identifies a total purporting to represent Vicky's uncompensated losses, or $66,085.68, and asserts $5,000 is a reasonable share of this uncompensated amount. This "calculation" does not withstand scrutiny. Rather, $66,085.68 is a number that was, essentially, plucked from thin air.

Vicky's attorney represents that $66,085.68 is derived from the total allowable restitution in Washington, or $183,819.00. But nothing in the letter explains how the latter figure relates to the actual economic harm Vicky suffered. Clearly, not all internet consumers of such images are from Washington.[10] It is equally clear that no single possessor of the images, Washingtonian or otherwise, caused Vicky's emotional distress. Thus, it is unclear why only Washingtonians would be responsible for this entire amount.

[10] As Vicky's attorney explained, Vicky has received $692,548.94 in restitution from other jurisdictions but has sought restitution in only one other Washington proceeding. RP 13. The outcome and details of that case are not apparent from the record.

The reasoning for the "pro rata" calculation is equally opaque. If Vicky has already been fully compensated for the harms allowable under the Washington statute, why does it make sense to hold a Washingtonian responsible for a proportion of uncompensated losses under the federal statute? The calculation propounded by Vicky's attorney, and therefore the State, not only compares apples and oranges, it creates a virtual fruit salad of juxtaposition.[11]

The random and speculative nature of the request is made even more transparent by the fact that the figure remains the same in the February and April letters, despite Vicky's attorney's apparent acknowledgment that the overall claim should be reduced based on the restitution framework in Washington.

In addition, although Vicky's attorney argued that her restitution claim was permissible based on Paroline, neither Vicky's attorney, nor the State, nor the court made any attempt to engage in the sort of calculation

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[11] At least one federal court has, moreover, expressed skepticism as to whether Vicky's calculation of total harm was realistic given that it failed to give sufficient weight to the ongoing impact of her initial abuse. United States v. Dunn, 777 F.3d 1171, 1181-82 (10th Cir. 2015) ("We think it inconsistent with "the bedrock principle that restitution should reflect the consequences of the defendant's own conduct" to hold Mr. Dunn accountable for those harms initially caused by Vicky's abuser.") (citing Paroline, 134 S. Ct. at 1725).

required by that decision. 134 S. Ct. at 1728 (listing factors to be considered by federal district court in setting restitution).[12]

Washington case law interpreting our state's restitution statute does not allow for such a speculative award. For example, in Griffith, burglars broke into Robert and Elaine Linscott's home and stole jewelry and other items. The Linscotts reported the theft and provided police a detailed list of the stolen items, along with their estimated values, which totaled $44,000. 164 Wn.2d at 963.

The day after the burglary was reported, Griffith entered a Spokane coin dealer with plastic bags containing jewelry, including a string of

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[12] The Paroline Court announced that federal district courts should "determine the amount of the victim's losses caused by the continuing traffic in the victim's images . . . , then set an award of restitution in consideration of factors that bear on the relative causal significance of the defendant's conduct in producing those losses." 134 S. Ct. at 1728. Those factors include:

> the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role.

Id.

pearls and what appeared to be a large diamond ring. Griffith sold the business miscellaneous gold jewelry for $96. Griffith also asked the business to appraise the diamond ring. One of the two owners offered her between $480 and $500, but she declined to sell it. Griffith eventually sold the business the pearl necklace. Id

Shortly after the burglary, Elaine searched local pawnshops and resale stores for her belongings. She found several items, including her pearl necklace, at the coin dealer. The police were called, and one of the business owners identified Griffith as the person who sold the stolen jewelry. Id.

The State charged Griffith with second degree trafficking in stolen property. She pled guilty and indicated she understood she would be ordered to pay restitution. Id. at 963-64.

The court held a restitution hearing. Elaine testified that approximately $11,000 worth of her jewelry was still missing, including a two and a half carat diamond ring, a sapphire ring, a couple of amethyst rings, and a pearl ring. She said she understood Griffith had been seen "carrying" these gems. Id. at 964.

One of the business owners testified Griffith came into the business with a "bag of stuff" and sold him scrap gold for $96. Id. When asked if he recalled seeing Elaine's "two and a half carat diamond ring,"

he said he saw a ring with a large, diamond-like stone, but did not examine it closely. Id. He remembered seeing the pearl necklace, but could not identify any of the other items listed in the police report as being in Griffith's possession. Id.

At the close of the hearing, the court ordered Griffith to pay $11,500, more than the full value of all the missing jewelry. Griffith appealed. Id.

The Supreme Court ultimately ordered reversal of the restitution award because the evidence did not support an award in that amount. Although Elaine testified Griffith possessed $11,000 worth of her jewelry, her testimony was based on what she believed the business owners saw. But the business owners' testimony did not support that, only that Griffith had a "bag of stuff," that Griffith brought in "several miscellaneous pieces of jewelry" which she sold for $96, and that she was offered approximately $500 for a ring. Id. at 966-67.

Moreover, Griffith pleaded guilty, not to burglary, but rather to possessing between $250 and $1,500 in stolen property. Because Griffith did not agree to pay for the Linscotts' losses from the burglary, she was responsible only for the value of the Linscotts' unrecovered property proven to be causally related to her crime. Id. at 967.

Dedonado is also instructive. There, Dedonado damaged a van's ignition switch while stealing the van. 99 Wn. App. at 253. At the restitution hearing, the State submitted a mechanic's preliminary estimate for damage to the van that included not only the damaged ignition switch, but also items such as "fill all fluids" and "align front suspension." Id. at 255. The court held that the State failed to meet its burden of proving restitution amounts because it was impossible to determine from the State's documentation whether all of the van repairs were related to the damaged ignition switch. Id. at 257. Thus, the State's documentation "did not establish a causal connection between Dedonado's actions and the damages." Id.

As Griffith and Dedonado demonstrate, the fact that the State can produce a figure associated with a victim's loss does not, without more, make the figure a reasonable estimate of loss, for purposes of the restitution statute. Although Vicky's attorney developed a mathematical calculation to explain, in part, the restitution request, nothing in the materials before the court establishes the rationale for such a calculation. The fact that Vicky requested the same amount after appearing to acknowledge that certain losses were not permitted firmly establishes the arbitrariness of the request, as well as the arbitrary nature of the court's award.

In summary, the court's award, simply adopting the request wholesale, was based on nothing more than "speculation [and] conjecture." Griffith, 164 Wn.2d at 965. As such, the award was impermissible under the restitution statute, and it must be reversed.

c. The plea agreement does not independently authorize the restitution award in this case.

Velezmoro anticipates the State may argue that the plea agreement provides an independent basis for the restitution award. In the plea agreement, Velezmoro agrees to pay for medical and counseling expenses. CP 41. Neither the plea agreement, nor the related materials, discusses a specific victim in need of counseling. CP 14-48.[13]

This statement does not constitute a separate basis for imposing restitution. See Griffith, 164 Wn.2d at 964 (reversing restitution award despite statement in plea agreement that defendant acknowledged she would be required to pay restitution). Velezmoro did not, for example, agree to plead to a lesser crime but to pay restitution specifically linked with the greater crime under RCW 9.94A.753(5).[14] See Griffith, 164

[13] The probable cause certification does allege that some of the children depicted in files found in Velezmoro's possession had been identified by the National Center for Missing and Exploited Children based on their appearance in previous cases. CP 5, 31. It does not specifically identify "Vicky" as one of these children.

[14] RCW 9.94A.753(5) states in pertinent part that:

Wn.2d at 965-66 (restitution is allowed only for losses that are causally connected to the crime charged, unless the defendant expressly agrees to pay restitution for crimes for which he was not convicted). Velezmoro was initially charged with the first degree of the crime, involving images depicting more serious conduct. RCW 9A.68A.070(1)(a), (2)(a); RCW 9A.68A.011(4) (listing categories of prohibited images). And the causation problems are present under either degree of the crime set forth under RCW 9.68A.070.

In a similar vein, Velezmoro did not agree to forgo the requirement that the State prove but-for causation as part of his plea agreement. Moreover, Velezmoro did not agree to cover a portion of counseling expenses vastly out of proportion to any discrete harm he caused. Finally, as Velezmoro's attorney argued below, and Vicky's attorney acknowledged, Vicky has been compensated for her losses in an amount far beyond the total amount she would be eligible to receive, under

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> [R]estitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement.

Washington law, from an offender or offenders who could be shown to be the cause-in-fact of her losses.

In summary, the plea agreement does not independently support the court's untenable $5,000 restitution award. For this reason as well, the order of restitution should be reversed.

2. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL.

If Velezmoro does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. This Court has ample discretion to deny the State's request for costs. For example, RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The record establishes any award of appellate costs would be unwarranted in this case. Here, at sentencing, the trial court waived all

non-mandatory fees as well as interest. CP 51. After ordering Velezmoro to pay $5,000 in restitution, the trial court found Velezmoro to be indigent and found that he could not contribute anything to the costs of appellate review. Supp. CP ___ (sub no. 60, Order of Indigency); see also Supp. CP ___ (sub no. 61, Declaration of Indigency). Indigency is presumed to continue throughout the appeal. State v. Sinclair, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 393719 at *7 (Jan. 27, 2016) (citing RAP 15.2(f)).

In summary, in the event that Velezmoro does not substantially prevail on appeal, this Court should not assess appellate costs against him. Provided that this Court believes there is insufficient information in the record to make such a determination, this Court should remand for the trial court to consider the matter.

D. CONCLUSION

This Court should reverse the trial court's restitution order.

DATED this 4th day of March, 2016.

Respectfully submitted,

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# APPENDIX A

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)

# § 2259. Mandatory restitution

United States Code Annotated Title 18. Crimes and Criminal Procedure Effective: April 24, 1996 *(Approx. 3 pages)*

**Proposed Legislation**

Effective: April 24, 1996

18 U.S.C.A. § 2259

## § 2259. Mandatory restitution

Currentness

**(a) In general.**--Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

**(b) Scope and nature of order.--**

**(1) Directions.**--The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

**(2) Enforcement.**--An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

**(3) Definition.**--For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for--

**(A)** medical services relating to physical, psychiatric, or psychological care;

**(B)** physical and occupational therapy or rehabilitation;

**(C)** necessary transportation, temporary housing, and child care expenses;

**(D)** lost income;

**(E)** attorneys' fees, as well as other costs incurred; and

**(F)** any other losses suffered by the victim as a proximate result of the offense.

**(4) Order mandatory.--(A)** The issuance of a restitution order under this section is mandatory.

**(B)** A court may not decline to issue an order under this section because of--

**(i)** the economic circumstances of the defendant; or

**(ii)** the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

**(c) Definition.**--For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

**NOTES OF DECISIONS** (52)

# APPENDIX B

WESTLAW

West's Revised Code of Washington Annotated
Title 9. Crimes and Punishments (Refs & Annos)
Chapter 9.94A. Sentencing Reform Act of 1981 (Refs & Annos)

**9.94A.753. Restitution--Application dates**

West's Revised Code of Washington Annotated Title 9. Crimes and Punishments *(Approx. 3 pages)*

**Proposed Legislation**

West's RCWA 9.94A.753

# 9.94A.753. Restitution--Application dates

Currentness

This section applies to offenses committed after July 1, 1985.

(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause. The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(2) During the period of supervision, the community corrections officer may examine the offender to determine if there has been a change in circumstances that warrants an amendment of the monthly payment schedule. The community corrections officer may recommend a change to the schedule of payment and shall inform the court of the recommended change and the reasons for the change. The sentencing court may then reset the monthly minimum payments based on the report from the community corrections officer of the change in circumstances.

(3) Except as provided in subsection (6) of this section, 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. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

(4) For the purposes of this section, for an offense committed prior to July 1, 2000, the offender shall remain under the court's jurisdiction for a term of ten years following the offender's release from total confinement or ten years subsequent to the entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction under the criminal judgment an additional ten years for payment of restitution. For an offense committed on or after July 1, 2000, the offender shall remain under the court's jurisdiction until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime. The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount. The offender's compliance with the restitution shall be supervised by the department only during any period which the department is authorized to supervise the offender in the

**NOTES OF DECISIONS** (358)

121 § 4; 1997 c 52 § 2; prior: 1995 c 231 § 2; 1995 c 33 § 4; 1994 c 271 § 602; 1989 c 252 § 6; 1987 c 281 § 4; 1985 c 443 § 10. Formerly RCW 9.94A.142.]

Notes of Decisions (358)

West's RCWA 9.94A.753, WA ST 9.94A.753
Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

**End of Document** 

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

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| STATE OF WASHINGTON | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | |
| v. | ) | COA NO. 73542-0-I |
| | ) | |
| JOHN VELEZMORO, | ) | |
| | ) | |
| Appellant. | ) | |

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHN VELEZMORO
13137 129 TH AVENUE
KIRKLANS, WA 98034

**SIGNED** IN SEATTLE WASHINGTON, THIS 4TH DAY OF MARCH 2016.

X Patrick Mayovsky