NO. 73542-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN VELEZMORO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN H. CHUN

BRIEF OF RESPONDENT

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A. ISSUES

1. Typically, under the Washington statute, restitution is imposed when it can be shown that a crime victim's losses would not have occurred but for the criminal conduct of the defendant. However, the "but for" causation test is not appropriate when the defendant is only one of some unknown number of persons who have possessed child pornography images of a known victim. Should this Court follow the United States Supreme Court, which, in interpreting a similar federal restitution provision, held that given the unique circumstances of the crime of possession of child pornography, "but for" causation is not required to impose restitution on a single possessor?

2. Among a substantial cache of child pornography pictures and videos, Velezmoro possessed eight images of a known child victim, "Vicky." The record before the trial court established Vicky's damages recoverable in Washington — lost past wages and costs of counseling — as well as total damages available in federal court and the amount of damages already recovered in other cases. Has Velezmoro failed to show that no reasonable judge would have imposed restitution in the amount of $5000, which is less than 10% of the as-yet-unrecovered Washington damages?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant John B. Velezmoro was charged by information with Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree. CP 1. The charged offense date covered the period from April 9, 2013, through May 21, 2013. Id. He pled guilty to a reduced charge of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the Second Degree. CP 29, 14-28. The guilty plea included a provision obligating Velezmoro to pay restitution "to include medical and counseling expenses." CP 41. The trial court sentenced Velezmoro to a standard-range sentence of three months in custody, community custody, and financial obligations to include restitution in an amount to be determined at a subsequent hearing. CP 51-52.

At the restitution hearing, "Vicky," a pseudonym for an identified minor victim depicted in images possessed by Velezmoro, was represented by private attorney Carol Hepburn. RP[1] 1. The State and Vicky's attorney requested restitution in the amount of $5000. RP 4, 13. In support of the requested restitution, Vicky's attorney submitted substantial documentation, including, *inter alia*, victim impact letters from Vicky, her

[1] The verbatim report of trial court proceedings is a single-volume transcript of the restitution hearing, referred to in this brief as RP __.

mother, and her stepfather (CP 131-44), psychological evaluation reports diagnosing Vicky with post-traumatic stress disorder resulting from her victimization and documenting the need for counseling (CP 148-77), and an economist's calculation of lost wages (CP 265-83). Ms. Hepburn argued that the requested amount, $5000, was not for the full amount of documented losses, but rather "a reasonable apportionment" for which Velezmoro, as one of the possessors of the pornographic images of Vicky, should be accountable. RP 4.

Velezmoro's attorney argued that Washington courts require "but for" causation for an award of restitution, and that the State could not show that Vicky's damages would not have occurred "but for" Velezmoro's possession of her images, since an untold number of other persons also, presumably, had possessed and viewed the same images. RP 5-9. Vicky's attorney countered that the causation issue had been resolved by a recent United States Supreme Court opinion[2] interpreting a federal restitution statute, and argued that because of the unique circumstances of the crime of possession of child pornography, "but for" causation wasn't required to support a restitution award. RP 10-11. The trial court agreed and imposed the requested $5000 in restitution. RP 13; CP 66-67.

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[2] Paroline v. United States, __ U.S. __, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014).

2. SUBSTANTIVE FACTS

In his plea agreement, Velezmoro stipulated that the facts set forth in the certification for probable cause were real and material facts for purposes of sentencing. CP 41. That document establishes the following:

A Kirkland Police detective received a report from the National Center for Missing and Exploited Children (NCMEC) indicating that Microsoft had reported an upload of over 1000 files containing child pornography to its cloud-based storage, SkyDrive. CP 30. The report showed that the upload had come from an IP address associated with John Velezmoro. Id. A detective viewed "a large amount of the uploaded photos" and believed them to depict illegal child pornography, including boys and girls appearing to be 10-14 years old engaged in different acts of sexual intercourse. CP 30-31.

In response to a search warrant, Microsoft provided investigators with the content of Velezmoro's SkyDrive account. CP 37. From that content, investigators submitted 1191 files to the NCMEC, which generated a report indicating that 121 of the files included "identified child" content.[3] CP 37. A laptop computer seized at Velezmoro's residence contained evidence of the child pornography uploads to the

[3] "Identified child" is defined as exact hash values that are associated with an image or video that appears to depict at least one child previously identified by law enforcement. CP 31.

SkyDrive account; the uploads occurred between April 8, 2013, and May 20, 2013. CP 38. All 121 of the "identified child" files had been uploaded from Velezmoro's computer. Id.

In an interview with detectives, Velezmoro claimed to have found a flashdrive that contained child pornography (still images and videos), and admitted that he had uploaded the content to his Microsoft account in SkyDrive. CP 34-35. He said that after he had done so, Microsoft had closed his account and sent him a message indicating he had violated rules. Id. Velezmoro admitted that he had looked at pornographic images of children and that he knew it was illegal to possess such material. Id. He also admitted that he visited websites that provided "stories" involving children, and that he used these "stories" in conjunction with the pornographic images of children for his sexual stimulation. CP 35.

The forensic examination of Velezmoro's computer also showed that the content had been uploaded to the computer from a USB flashdrive on April 8, 2013. CP 38. Examiners were able to determine that the same flashdrive had also been used to upload child pornography to computers seized in other Kirkland Police child pornography investigations in 2009 and 2011. CP 38-39.

Eight of the images found in Velezmoro's possession were identified as part of the "Vicky" series. CP 72. Images of Vicky's sexual

abuse were recorded specifically for distribution on the internet. CP 73. She was forced to hold a sign up to the intended viewers inviting them to "Come and Play." Id. Much of Vicky's sexual abuse was a direct response to "orders" for scripted videos of rape, sodomy, costuming, and bondage placed with her abuser by the pedophiles who downloaded and traded her images. Id. She was forced to perform according to a script made at the request of other pedophiles. Id. The abuse was not separate and apart from the making of the videos, but was done in order to make the videos. Id.

The direct sexual abuse Vicky suffered lasted from the time she was about 5 until she was 13. CP 154. Vicky's abuser, her father, is in prison serving a 50-year sentence. CP 79. When Vicky was 17 she learned that her sexual abuse was disseminated over the internet, and she has since come to learn that the images are some of the most widely distributed images of child pornography in the world. CP 155. Vicky has developed a hypervigilance which causes her to suspect that any person she may see or meet might have downloaded and derived prurient enjoyment from the images of her abuse. CP 74. Her psychologist has

described the continued downloading of her images as "a form of psychological acid drip" on her well-being.[4] CP 74.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY ORDERING RESTITUTION WITHOUT A SHOWING OF "BUT FOR" CAUSATION.

Velezmoro claims that restitution may not be ordered without a showing of "but for" causation, i.e., a direct causal link between a defendant's criminal acts and a victim's injuries. Velezmoro argues that because "Vicky" did not know that he had possessed and viewed her images, she could not have experienced any compensable injury from his criminal actions. His argument should be rejected. Although this appears to be a case of first impression in Washington, the United States Supreme Court recently held that because of the unique circumstances of the crime of possession of child pornography, courts may impose restitution without a "but for" causal connection. It was, therefore, appropriate for the trial court to require that Velezmoro pay restitution even though he is only one of some unknown number of criminals who have viewed the exploitative images of Vicky.

The authority to impose restitution is not an inherent power of the court, but is derived from statutes. State v. Gray, 174 Wn.2d 920, 924,

[4] For a complete history, diagnoses, and symptoms, see the April 11, 2014, report of clinical psychologist Randall L. Green, Ph.D. CP 148-69.

280 P.3d 1110 (2012); State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). The controlling statute here reads, in relevant part:

> (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 or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution 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.

RCW 9.94A.753(5); see State v. Blanchfield, 126 Wn. App. 235, 240, 108 P.3d 173, review denied, 155 Wn.2d 1020 (2005).

One goal of restitution is to require the defendant to face the consequences of his conduct. State v. Enstone, 137 Wn.2d 675, 680, 974 P.2d 828 (1999); State v. Dauenhauer, 103 Wn. App. 373, 378, 12 P.3d 661 (2000), review denied, 143 Wn.2d 1011 (2001). The statute is designed to promote respect for the law by providing punishment that is just. Davison, 116 Wn.2d at 922. Restitution is both punitive and compensatory in nature. State v. Kinneman, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005). Appellate courts review interpretation of

RCW 9.94A.753 de novo.[5] State v. Chapman, 176 Wn. App. 615, 309 P.3d 669 (2013).

Under RCW 9.94A.753(5), a restitution order must be grounded on the existence of a causal relationship between the crime charged and proven and the victim's damages. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008); Davison, 116 Wn.2d at 919. Some decisions state the rule that losses are causally connected if, "but for" the charged crime, the victim would not have incurred the loss. Griffith, 164 Wn.2d at 966; State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007); State v. Oakley, 158 Wn. App. 544, 552, 242 P.3d 886 (2010). However, no cases cited by Velezmoro stand for the proposition that "but for" causation is always required by RCW 9.94A.753(5) regardless of the factual circumstances. Moreover, the United State Supreme Court, in analyzing a similar restitution statute, has held that because of the unique circumstances of the crime of possession of child pornography, "but for" causation is not required to support an award of restitution. Paroline v. United States, __ U.S. __, 134 S. Ct. 1710, 1727, 188 L. Ed. 2d 714 (2014).

[5] The decision of the trial court to impose restitution under the statute is reviewed de novo. However, the trial court's determination of the amount of restitution awarded, addressed in the next argument section, is reviewed for an abuse of discretion. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999).

In Paroline, when the victim was eight or nine, she was sexually abused by her uncle in order to produce child pornography. Id. at 1717. Her uncle was prosecuted, required to pay restitution, and sentenced to a lengthy prison term. Id. The victim underwent an initial course of therapy and, with the support of her family, an "optimistic assessment" was justified. Id. But her functioning appeared to decline in her teenage years; a major blow to her recovery came when, at the age of 17, she learned that images of her abuse were being trafficked on the internet. Id. Paroline is one of the individuals who possessed this victim's images. Id. He pled guilty in federal court to one count of possession of material involving the sexual exploitation of children in violation of 18 U.S.C. § 2252. Id. Paroline admitted to possessing between 150 and 300 images of child pornography, only two of which depicted this known victim. Id. at 1717-18.

The Paroline victim sought restitution pursuant to 18 U.S.C. § 2259 for lost income and treatment and counseling expenses. Id. at 1718. The parties submitted competing expert reports and stipulated that the victim did not know who Paroline was and that none of her claimed losses flowed from any specific knowledge about him or his offense conduct. Id. The federal district court declined to award restitution, finding that the Government had failed in its "burden of proving the

amount of the victim's losses 'directly produced by Paroline that would not have occurred without his possession of her images.'" Id. at 1718 (citation omitted). The Fifth Circuit Court of Appeals reversed, holding not only that restitution was appropriate, but also that restitution was not limited to losses proximately caused by the defendant, and each defendant who possessed the victim's images should be made liable for the victim's entire losses from the trade in her images, even though other offenders played a role in causing those losses. Id. at 1718 (citing In re Amy Unknown, 701 F.3d 749, 772-74 (5th Cir. 2012) (en banc)).

The Supreme Court granted review for the purposes of determining the entitlement to and amount of restitution under the federal statute. Id. at 1718. The Paroline Court addressed at considerable length the challenges in determining both proximate cause and cause in fact in cases involving the crime of possession of child pornography, where many wrongdoers have contributed to a victim's harm. First the Court discussed, generally, the concepts of proximate and actual cause:

> As a general matter, to say one event proximately caused another is a way of making two separate but related assertions. First, it means the former event caused the latter. This is known as actual cause or cause in fact. ...The idea of proximate cause, as distinct from actual cause or cause in fact, defies easy summary. It is "a flexible concept," that generally "refers to the basic requirement that ... there must be 'some direct relation

> between the injury asserted and the injurious conduct alleged.'"

Paroline, 134 S. Ct. at 1719 (citations omitted).

Referring to damages caused by possession of child pornography as an "atypical causal process," the Court addressed the very issue present in the case at bar, determining the responsibility of a single defendant among many offending parties.

> The difficulty is in determining the "full amount" of those general losses, if any, that are the proximate result of the offense conduct of a particular defendant who is one of thousands who have possessed and will in the future possess the victim's images but who has no other connection to the victim.

Paroline, at 1722. The Court stated that "the most difficult aspect of this inquiry concerns the threshold requirement of causation in fact." Id.

The Court recognized the "but for" test as the most common approach to establish cause in fact: "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." Id. The Court said that "but for causation could be shown with ease" in cases involving producers and distributors of child pornography. Id. But the Court recognized the inadequacy of the "but for" test in cases involving mere possession of child pornography.

> [I]t is not possible to prove that [the victim's] losses would be less (and by how much) but for one possessor's individual role in the large, loosely connected network through which her images circulate. Even without Paroline's offense, thousands would have viewed and would in the future view the victim's images, so it cannot be shown that her trauma and attendant losses would have been any different but for Paroline's offense. That is especially so given the parties' stipulation that the victim had no knowledge of Paroline.

Id. at 1723 (citation to record omitted). The Court therefore rejected the "but for" test, saying that a "less demanding causal standard" was necessary under the circumstances. Id. at 1724.

> It would be anomalous to turn away a person harmed by the combined acts of many wrongdoers simply because none of those wrongdoers alone caused the harm. And it would be nonsensical to adopt a rule whereby individuals hurt by the combined wrongful acts of many (and thus in many instances hurt more badly than otherwise) would have no redress, whereas individuals hurt by the acts of one person alone would have a remedy.

Id. at 724. The Court turned to tort principles for the proper cause in fact test in these circumstances:

> When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.

Id. at 1723 (quoting Prosser and Keeton on Law of Torts § 41, p. 268 (5th ed. 1984)).

Applying this less demanding standard for cause in fact, Paroline reversed the Fifth Circuit Court of Appeals, which had disallowed restitution for Paroline's victim.

> The cause of the victim's general losses is the trade in her images. And Paroline is a part of that cause, for he is one of those who viewed her images. While it is not possible to identify a discrete, readily definable incremental loss he caused, it is indisputable that he was a part of the overall phenomenon that caused her general losses.

Paroline, at 1726. The Court also articulated sound policy bases to hold possessors of child pornography responsible for restitution:

> One reason to make restitution mandatory for crimes like this is to impress upon offenders that their conduct produces concrete and devastating harms for real, identifiable victims. It would be inconsistent with this purpose to apply the statute in a way that leaves offenders with the mistaken impression that child-pornography possession (at least where the images are in wide circulation) is a victimless crime.

Id. at 1727 (citation omitted).

Velezmoro's argument that "Paroline is of no assistance to the State because it interprets a specialized federal statute with an alternative concept of causation" is easily brushed aside. Appellant's brief at 11. Although Paroline interpreted a federal statute, that statute does not have an "alternative concept of causation" as argued by Velezmoro, but rather a typical and generic causation provision indistinguishable in any meaningful way from Washington's statutory causation provision.

Paroline addressed the only causation provision in the federal statute in this way:

> All parties agree § 2259 imposes some causation requirement. The statute defines a victim as "the individual harmed as a result of a commission of a crime under this chapter." § 2259(c). The words "as a result of" plainly suggest causation. And a straightforward reading of § 2259(c) indicates that the term "a crime" refers to the offense of conviction. So if the defendant's offense conduct did not cause harm to an individual, that individual is by definition not a "victim" entitled to restitution under § 2259. ... Thus, *as is typically the case with criminal restitution*, § 2259 is intended to compensate victims for losses caused by the offense of conviction.

Paroline, at 1720 (citations omitted, emphasis added).

The causation provision in the Washington statute reads: "Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person...". RCW 9.94A.753(5). There is no functional difference between the federal linkage of causation and restitution, an "individual harmed as a result of a commission of a crime," and this state's: "an offense which results in injury to any person." As noted above, the Paroline majority opinion authored by Justice Kennedy refers to the federal restitution statute as "typical." Justice Roberts, in a dissent joined by justices Scalia and Thomas, repeatedly refers to the federal statute as a "generic" restitution statute. Paroline, at 1730-35.

In Davison, supra, our supreme court stated that "[t]he very language of the restitution statutes indicates legislative intent to grant broad powers of restitution." 116 Wn.2d at 920. Courts should not give the statute an overly technical construction that would permit the defendant to escape from just punishment. State v. Tobin, 161 Wn.2d at 524; Davison, 116 Wn.2d at 922; State v. Cosgaya-Alvarez, 172 Wn. App. 785, 791, 291 P.3d 939, review denied, 177 Wn.2d 1017 (2013).

This Court should adopt the sound reasoning and policy articulation of the Supreme Court by holding, in this factually identical case, that traditional "but for" causation is not required to hold Velezmoro, as one of some unknown number of persons who possessed exploitative images of Vicky, responsible for restitution to his victim.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING VELEZMORO TO PAY RESTITUTION FOR HIS RELATIVE ROLE IN CAUSING THE VICTIM'S INJURIES.

In addition to claiming that the trial court had no authority to impose restitution at all, Velezmoro argues that the amount imposed by the trial court, $5000, should be disallowed because, he says, it was based on speculation and conjecture. Velezmoro's argument should be rejected. Although fixing the victim's damages directly resulting from the conduct of any single possessor of child pornography is not susceptible to precise

calculation, the purposes of restitution, as articulated by the Paroline Court, require that a trial court hold each individual offender responsible for a relative portion of the victim's overall damages. Here, the trial court did not abuse its discretion by fixing that amount at $5000.

Imposition of a restitution amount is governed by RCW 9.94A.753(3), which reads in relevant part:

> 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 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.

"While restitution must be based on 'easily ascertainable damages,' the amount of harm or loss need not be established with specific accuracy." Kinneman, 155 Wn.2d at 285. "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 at 965 (quoting State v. Fleming, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994)). "Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture." Kinneman, 155 Wn.2d at 285. 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. Id.

A trial court's order of restitution will not be disturbed on appeal absent an abuse of discretion. Enstone, 137 Wn.2d at 679. A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

In Paroline, because the federal district court did not award restitution, the Supreme Court did not have a specific award or methodology to review. However, to assist the district court in fashioning an award on remand, Paroline discussed at length the basis for, and recommended approach to, holding a single possessor of child pornography responsible for restitution. This extended passage from Paroline is particularly instructive:

> In this special context, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but **where it is impossible to trace a particular amount of those losses to the individual defendant** by recourse to a more traditional causal inquiry, a court applying [the federal statute] should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses. The amount would not be severe in a case like this, given the nature of the causal connection between the conduct of

> a possessor like Paroline and the entirety of the victim's general losses from the trade in her images, which are the product of the acts of thousands of offenders. It would not, however, be a token or nominal amount. The required restitution would be a reasonable and circumscribed award imposed in recognition of the indisputable role of the offender in the causal process underlying the victim's losses and suited to the relative size of that causal role. This would serve the twin goals of helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child-pornography crimes, even simple possession, affect real victims.

134 S. Ct. at 1727 (emphasis added).

Paroline recognized the imprecision that will be involved in assessing restitution owed by a single possessor of child pornography, and hence emphasized the necessity of discretion and judgment on the part of trial courts.

> A court must assess as best it can from available evidence the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses. This cannot be a precise mathematical inquiry and involves the use of discretion and sound judgment.

Id. at 1727-28.

Here, the trial court did exactly as advised by Paroline; it applied discretion and judgment to affix an apportioned amount of the total restitution to Velezmoro, in an effort to recognize his causal role in Vicky's damages. Vicky's lawyer provided the court with a voluminous factual record in support of the requested restitution, including victim

impact letters from Vicky, her mother, and her stepfather, psychological evaluations substantiating the need for past and anticipated future counseling, and forensic economic analyses of lost wages. In letters addressed to the judge and defense counsel (both were part of the record before the court), and in her oral argument, Ms. Hepburn detailed the basis for the requested amount of $5000. Only two categories of damages were requested: past lost wages (documented wage loss from the offense date in April 2013, through the date of the restitution hearing in April 2015) (CP 83-84), and the costs of post-offense counseling. CP 83.

The request made on Vicky's behalf recognized the distinction between damages allowed under the federal system and the more restrictive damages available in Washington. CP 83-84. Whereas the federal law allows recovery for future lost wages, litigation expenses, and attorney's fees, Vicky's counsel conceded that those categories were not recoverable under the Washington statute. Id. Vicky's documented recoverable losses under Washington law for past lost wages and post-offense counseling (totaling $183,819.00) amount to 17% of her total documented losses allowable under federal law ($1,084,053.29). CP 84. Vicky then applied that percentage to the total restitution that she had already recovered in federal cases ($692,548.94), and considered the resulting figure ($117,733.32) to be already recovered Washington

restitution. Id. Subtracting this offset ($117,733.32) from the total documented Washington damages ($183,819.00), Vicky identified Washington damages that had not yet been paid ($66,085.68) from the recovery in other courts. Id. From that amount of unrecovered Washington damages, $66,085.68, Vicky asked the trial court to require Velezmoro to pay $5000 as "a reasonable apportionment." RP 4. Vicky's attorney recognized the imprecision of the request, saying, "just as Paroline says that, you know, we can't apply a rigorous mathematical formula," but noted that the requested amount of $5000 was less than 10% of the unrecovered Washington damages. RP 5.

Granting Vicky and the State's requested restitution of $5000, the trial court stated:

> There is unmet restitution. I agree with the theory that in a case like this, mathematical precision with respect to the actual amount isn't required....
>
> I think it's a reasonable apportionment. Mathematically precise, it's not. I feel like defendants who are in your client's position are playing a role in causing the harm.... Without them, there is no market. There has to be responsibility for the harm that they inflict on these victims.

RP 14.

On appeal, Velezmoro attacks the restitution figure as not sufficiently related to Velezmoro's individual criminal conduct, citing State v. Griffith, supra, and State v. Dedonado, 99 Wn. App. 251, 991 P.2d 1216 (2000). Both cases are inapposite, as neither deals with a situation in which the defendant is but one of some unknown number of persons who have contributed to a victim's injuries in an indivisible manner. There is no Washington authority that addresses assessment of restitution in cases involving possession of child pornography, or any reasonably analogous situations. By arguing that the restitution award was based on "speculation and conjecture" and "plucked from thin air" (Appellant's brief at 12), Velezmoro aligns himself with the Paroline dissent authored by Justice Roberts, which opined that in the case of a single possessor of child pornography, restitution could not be affixed with sufficient certainty.[6]

Following the guidance of the Paroline majority, this Court should uphold the trial court's reasoned approach that resulted in a restitution amount that is, in the words of the Supreme Court, neither "severe" nor a "token or nominal amount." Paroline at 1727. Substantial evidence

[6] "When it comes to Paroline's crime—possession of two of Amy's images—it is not possible to do anything more than pick an arbitrary number for that 'amount.' And arbitrary is not good enough for the criminal law." Paroline, at 1730.

supported the calculation of Vicky's total losses generally and as recoverable under Washington law. Although Velezmoro's precise share is not calculable, given that it is unknown how many thousands of persons have possessed and viewed Vicky's images or will one day be successfully prosecuted and held accountable for some portion of restitution, the $5000 ordered was a reasonable apportionment representing less than 10% of the outstanding damages recoverable under Washington law.

The $5000 ordered is a reasonable award imposed in recognition of the indisputable role Velezmoro played in the causal process underlying Vicky's losses and is suited to the relative size of his role. The award serves the twin purposes of helping the victim achieve restitution for all her losses and impressing upon offenders the fact that child pornography crimes affect real victims. All offenders should face the consequences of their criminal conduct, and this would not happen without an apportionment of restitution. The trial court did not abuse its discretion, as it cannot be said that no reasonable court would have made this restitution award under these circumstances.

D. CONCLUSION

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

DATED this 28 day of April, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Jennifer Winkler, containing a copy of the Brief of Respondent, in STATE V. JOHN B. VELEZMORO, Cause No. 73542-0-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.

LiBrame

4/28/16

Date: April 28, 2016

Done in Seattle, Washington