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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 94604-3

No. 74416-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD GOSNEY,

Petitioner.

PETITION FOR REVIEW

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WASHINGTON APPELLATE PROJECT
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A. IDENTITY OF PETITIONER

Donald Gosney, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Gosney appealed two King County Superior Court restitution orders, following his plea of guilty to one count of assaulting a police officer in the third degree. The Court of Appeals affirmed these orders in an unpublished decision, on April 24, 2017. Appendix. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

If the defendant disputes the amount of restitution requested in a criminal case, the State must present substantial evidence to prove the victim's actual damages. The evidence must be reliable and refutable to comport with due process. Where the State requested restitution to reimburse the Washington State Department of Labor and Industries for funds paid to compensate the alleged victim for medical care and lost wages and presented insufficient corroborating evidence to prove that the expenses incurred by the victim, as well as his lost wages, were caused by the actions of Mr. Gosney, was restitution thus awarded in violation of the statute, as well as in violation of constitutional due

process? And was the Court of Appeals affirmance therefore in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1)?

D. STATEMENT OF THE CASE

Donald Gosney is a disabled veteran who served in the United States military police for eight years, including tours of service in Vietnam, Panama, and the Philippines. CP 101-06. He was honorably discharged following a helicopter accident in 1978, which left him with a permanent back injury. *Id.* After eight surgeries, an addiction to painkillers and other drug use followed, and Mr. Gosney's involvement with the criminal justice system began. *Id.*

Mr. Gosney cannot clearly recall the events that led to Officer Scott Oak's injury on August 5, 2014. On that day, Mr. Gosney drove to the SCORE¹ jail facility to pick up a friend who had been released. CP 5. According to officers, Des Moines Police Officer Scott Oak approached Mr. Gosney, who was waiting in his vehicle, and informed him that Mr. Gosney had an open arrest warrant. Mr. Gosney put his car into reverse and began to drive away. *Id.* at 5-6. Rather than step

¹ SCORE (South Correctional Entity Regional Jail) is located in Des Moines, Washington. <http://www.scorejail.org/> (last viewed 5/23/17).

out of the way, Officer Oak attempted to block the open car door with his hand, then tried to grab the steering wheel of Mr. Gosney's car. Id.

After several miles of pursuit, Mr. Gosney's vehicle was stopped by officers using a "PIT maneuver."² CP 7. Deputy Weekley noted that upon arrest, Mr. Gosney appeared to be either intoxicated or to have some sort of medical condition – or both. Id. Mr. Gosney was evaluated by a Des Moines drug recognition expert, who determined Mr. Gosney was suffering from some sort of stroke. CP 7. Mr. Gosney was transported to Highline Hospital and admitted for several weeks. CP 7; 11/19/15 RP 24.

Meanwhile, Officer Oak stated he had suffered a contusion to his shoulder, cervical strain, and a contusion to his face, scalp and neck, as well as a contusion to his leg when Mr. Gosney drove away. CP 7. Officer Oak stated he missed three days of work due to his injuries. Id.; CP 97-100; 6/15/15 RP 15.

The State charged Mr. Gosney with one count of assault in the third degree and one count of attempting to elude. CP 1-2. Mr. Gosney pled guilty to assault in the third degree, for an agreed sentence of 51

² PIT refers to the Pursuit Immobilization Technique utilized by officers. CP 7.

months incarceration. CP 10-36. One of the conditions of Mr. Gosney's sentence was the payment of restitution in an amount to be determined at a later hearing. CP 37-45.

In support of its restitution request, the State submitted a packet of materials, including explanations of benefits from the Washington State Department of Labor & Industries (L & I), medical billing, workers' compensation documents, and a Victim Impact Statement from Officer Oak. CP 58-96; CP 97-100. The prosecutor requested restitution in the amount of \$61,581.16, in order to compensate L & I for Officer Oak's expenses. CP 46.

Mr. Gosney objected to the restitution order at a hearing on November 19, 2015, and the trial court reduced this amount, citing insufficient proof of causation to support the claim for mental health therapy, expenses which allegedly totaled \$7,085.07. 11/19/15 RP 29 (ordering restitution of \$54,496.23); CP 46 (Order Setting Restitution). Mr. Gosney objected to the lower amount as well. He argued the State had failed to prove a causal connection to support the award of \$54,496.23, supplying only a list of medical expenses and time loss entries, without evidence to show the causal relationship between the injury and the amounts. *Id.* at 27-28.

On December 17, 2015, the State produced a letter from Officer Oak's therapist, stating she was treating him for "the LNI on the job injury" associated with his related claim number. CP 61. The State also produced a letter from Officer Oak, indicating he was seeing this therapist for psychological treatment "directly due to this assault." CP 60. The court ordered the additional amount of restitution, over Mr. Gosney's objection to the award in total. 12/17/15 RP 3; CP 54 (Order Setting Additional Restitution).

Mr. Gosney appealed, arguing the evidence failed to show a causal relationship between the assault and the medical expenses and wage loss the officer claimed. On April 24, 2017, the Court of Appeals affirmed the order of restitution. Appendix.

Mr. Gosney seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1).

1. A trial court must comply with both the SRA and with principles of constitutional due process before ordering restitution.

The court's authority to impose restitution is statutory, and is found in the Sentencing Reform Act. State v. Tobin, 161 Wn.2d 517,

524, 166 P.3d 1167 (2007); RCW 9.94A.753. Restitution is meant to be both punitive and compensatory. State v. Cosgaya-Alvarez, 172 Wn. App. 785, 790-91, 291 P.3d 939 (2013); State v. Kinneman, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005).

When the State seeks restitution to cover expenses paid by L & I, reimbursement of L & I is authorized by RCW 9.94A.753(7). That statute provides in part, “Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.” RCW 9.94A.753(7).

Setting the restitution amount is an integral part of the sentencing proceeding that must be performed with the same care and deliberation as other aspects of the sentencing decision. State v. Pollard, 66 Wn. App. 779, 784-85, 834 P.2d 51 (1992). Evidence admitted at a sentencing hearing must meet due process requirements, such as providing the defendant an opportunity to refute the evidence presented; the evidence must also be reliable. State v. Strauss, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992), citing Townsend v. Burke, 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948); see also State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012).

In addition, restitution proceedings must comply with principles of constitutional due process. Pollard, 66 Wn. App. 779, 784-85; Const. art. I, § 3; U.S. Const. amend. XIV. The Due Process Clause places the burden on the State to ensure that the record before the court is adequate to support a court's sentencing decision. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). Due process requires that the court's decision be based upon information bearing "some minimal indicium of reliability *beyond mere allegation*." Id. (internal quotation marks and citations omitted). A defendant may not be sentenced on the basis of information that is false, lacks minimum indicia of reliability, or is unsupported by the record. State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). Any action taken by the sentencing judge that fails to comport with due process requirements is constitutionally impermissible. Id.

The Due Process Clause requires the court's restitution award be based upon evidence that is reliable and refutable. Pollard, 66 Wn. App. at 784-85. If the State relies upon hearsay statements, the record must be adequate to provide the defendant with a sufficient basis to rebut the State's evidence. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). By the same token, "the record must permit a

reviewing court to determine exactly what figure is established by the evidence.” Pollard, 66 Wn. App. at 785.

These basic principles of fairness were violated in this case because the State did not present sufficient reliable and refutable evidence to prove the actual amount of Officer Oak’s losses; for this reason, review should be granted pursuant to RAP 13.4(b)(1).

2. The restitution order was not supported by sufficient evidence of causation.

According to the above well-established principles, the State was required to present sufficient reliable evidence to prove the amount in medical expenses and lost wages the officer actually lost as a result of the assault.

The State’s evidence of actual loss consisted only of a report compiled by an investigator at the Victim Assistance Unit of the prosecutor’s office. CP 58-96. The report is comprised of a letter from the investigator, stating that L & I had already paid the claim to Officer Oak, and that for this reason, L & I is requesting restitution from Mr. Gosney. CP 59 (breaking \$61,581.16 claim into two parts – medical claims (\$31,884.88) and time loss (\$29,696.28)).³

³ The packet contains a letter from L & I, describing its payment to Oak as \$61,581.16 as “worker’s compensation benefits,” and states that this figure

However, no evidence, testamentary or documentary, actually connected the voluminous medical billing evidence with the incident caused by Mr. Gosney on August 5, 2014. To add to the confusion, the record shows that Officer Oak claimed he missed only three days of work as a result of the incident, not the year indicated by the time loss L & I paperwork. CP 97-100 (Victim Impact Statement); CP 6-7. At best, the State's evidence was inconsistent as to the restitution amount; at worst, it was quite contradictory. Either required an evidentiary hearing, which the court failed to hold. State v. Dedonado, 99 Wn. App. 251, 256-57, 991 P.2d 1216 (2000) (a causal connection is not established simply by submitting proof of expenditures; an evidentiary hearing is required); see also State v. Dennis, 101 Wn. App. 223, 227, 6 P.3d 1173 (2000) (summary of medical treatment is insufficient to show causal connection).

The State's evidence was insufficient because it was double hearsay and Mr. Gosney had no opportunity to refute or rebut it.

may increase. CP 62. This exhibit also contains approximately 25 pages of medical billing records for Oak, on pages titled "claimant history profile." CP 66-92. These entries are not categorized, but indicate that Oak sought medical treatment from a variety of providers, including physicians, radiologists, chiropractors, massage therapists, rehabilitation clinics, psychologists, and physical therapists. CP 66-92.

The State failed to produce actual paystubs or any other corroborative evidence to support the hearsay allegations regarding the amount of loss. CP 63-65. The State also failed to connect the 25 pages of medical billing entries to the event on August 5, 2014, or to show how any of these medical, chiropractic, massage, or other treatments were necessitated by Mr. Gosney's actions.

As discussed, it is the State's burden to prove the amount of restitution, and that it was causally related to the defendant's actions. E.g., Dedonado, 99 Wn. App. at 256. Because no witnesses were called at the restitution hearing, the only statements relied upon by the State to show the medical billing and time loss expenses were causally connected to the incident were the following: 1) a four-sentence email from Officer Oak, stating that he sought psychological treatment and therapy from Dr. Cheryl Hart, related to this incident, CP 60; 2) a one-sentence email from Dr. Cheryl Hart, verifying the same, CP 61; and 3) a Victim Impact Statement signed by Officer Oak, CP 97-100.

The State also relied on vague and unsupported conclusions offered by the prosecutor that the benefits provided to Officer Oak by L & I were related to injuries that he suffered as a result of the incident

and were authorized. 11/19/15 RP 25.⁴ But it was the duty of the *court*, not the State or L & I, to determine whether restitution was authorized, and whether the expenses were causally connected. Tobin, 161 Wn.2d at 524; RCW 9.94A.753. To allow a court to impose restitution based on a third party's assessment of how much restitution is due, without requiring the State to present evidence to support the allegations, or offering the defense an opportunity to refute them, is a violation of constitutional due process. Mendoza, 165 Wn.2d at 920; Ford, 137 Wn.2d at 481; Pollard, 66 Wn. App. at 784-85; Kisor, 68 Wn. App. at 620; Dedonado, 99 Wn. App. at 256-57 (also holding the State must show the insurer did not pay for items of greater or lesser value, but must show the actual loss).

Here, the State merely presented evidence of how much the L & I fund paid to Officer Oak, without proof of his injury was caused by Mr. Gosney, and indeed – without proof that he is not actually working, since the State also filed a document indicating the officer only missed three days of work. Because Mr. Gosney disputed the restitution

⁴ Prosecutor: "The documentation that has been provided are for medical services rendered as a result of those injuries, and we believe that the additional amount, the roughly \$54,000, is appropriate and the Court should sign that order." 11/19/15 RP 25.

amount, the State was required to present additional evidence to show the amount paid by L & I was equal to the amount of Officer Oak's actual losses. Dedonado, 99 Wn. App. at 257. The State failed to do so. For this reason, and also because the State merely relied on double hearsay that Mr. Gosney had no opportunity to rebut, the restitution award violated both the statute and constitutional due process.

Mendoza, 165 Wn.2d at 920; Ford, 137 Wn.2d at 481; Dennis, 101 Wn. App. at 229; Dedonado, 99 Wn. App. at 257; Kisor, 68 Wn. App. at 620; Pollard, 66 Wn. App. at 784-85.

3. The trial court abused its discretion in ordering restitution; therefore, this Court should grant review of the Court of Appeals decision.

When the record is inadequate to support a restitution award, the Court must vacate the restitution order. Dedonado, 99 Wn. App. at 257; Dennis, 101 Wn. App. at 229 (noting that if the State has failed to produce sufficient evidence to support a restitution award within the 180-day time period after sentencing, crime victims may pursue civil remedies against offenders).

Because the record was inadequate to sustain the restitution award, the trial court abused its discretion when it ordered Mr. Gosney

to pay either \$54,496.23 or \$61,581.16 in restitution. The Court of Appeals should have vacated the trial court's order.

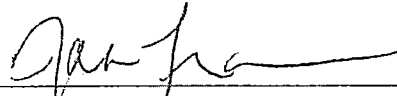
Accordingly, the Court of Appeals affirmance is in conflict with this Court's decisions, and review should be granted. RAP 13.4(b)(1).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court. RAP 13.4(b)(1).

DATED this 24th day of May, 2017.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	DIVISION ONE
Respondent,)	No. 74416-0-1
v.)	(consol. with
)	No. 74692-8-1)
DONALD DAVID GOSNEY,)	UNPUBLISHED OPINION
Appellant.)	
<hr/>		FILED: April 24, 2017

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STATE OF WASHINGTON
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DWYER, J. — Donald Gosney appeals from two restitution orders imposed upon him following his plea of guilty to one count of assaulting a police officer in the third degree. Gosney asserts that the evidence presented at the restitution hearings was insufficient to establish a causal relationship between his assault on the officer and the medical expenses and wage loss the officer claimed.

There was sufficient evidence to support the trial court's order. The trial court did not abuse its discretion. Accordingly, we affirm.

1

Gosney was charged with assault in the third degree and attempting to elude a pursuing police vehicle. The State alleged that Gosney assaulted and injured a police officer who was attempting to arrest him and then led police on a

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car chase. The officer suffered cervical strain as well as injuries to his shoulder, face, scalp, neck, and leg. Gosney pleaded guilty to the charge of assault in the third degree in exchange for dismissal of the charge of eluding a pursuing police vehicle. His guilty plea was to real facts as set forth in the certificate of probable cause.

As part of Gosney's guilty plea, he agreed to pay full restitution in an amount to be determined at a restitution hearing. At the subsequent restitution hearing, the State presented evidence that the amount of losses incurred was \$61,581.16. To prove these losses, the State introduced ledgers from the Department of Labor and Industries (L&I), detailing the providers who treated the injured officer, the dollar amount of their services, and the dates on which the treatments occurred. The cover letter from L&I provided the date of injury, injured party, and claim number. Some of the officer's treatment consisted of psychological counseling. The L&I ledgers also included amounts paid by the department to compensate the officer for wages lost as a result of his injuries. All of the L&I documentation was related to the same claim number.

At the restitution hearing, Gosney challenged the State's evidence, arguing that it did not sufficiently establish causation between his assault of the officer and the losses claimed. The trial judge stated that she was familiar with industrial insurance law and documentation and ruled that the evidence presented was sufficient to establish \$54,496.23 in losses. The trial court did, however, reserve ruling on whether there was sufficient evidence to establish that the costs of psychological treatments were related to Gosney's assault of the

officer. The trial court set a second restitution hearing, allowing the State to provide more evidence to prove that the psychological treatment was causally related to the assault.

At the second restitution hearing, the State provided additional evidence, including a letter from the officer's therapist—signed under penalty of perjury—stating that the psychological treatment she provided was related to the assault. The State also provided an e-mail from the officer, stating that, as a result of Gosney assaulting him, he sought psychological counselling. The State additionally provided an e-mail from an L&I adjudicator, stating that the psychiatric services paid by the department were related to Gosney's assault on the officer. At the conclusion of the second restitution hearing, the trial court held that there was sufficient evidence that Gosney's assault of the officer caused the expenses for psychological services.

II

Gosney first asserts that the trial court erred by entering two restitution orders against him, totaling \$61,581.16. This is so, Gosney avers, because there was insufficient evidence from which the trial court could conclude that his actions were the proximate cause of the claimed losses. We disagree.

Pursuant to RCW 9.94A.750(5), a court may order restitution "whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property." An order of restitution may be based on "easily ascertainable damages for injury to or loss of property, actual expenses incurred

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for treatment for injury to persons, and lost wages resulting from injury.” RCW 9.94A.750(3).

The standard of review for a restitution order is abuse of discretion. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991) (citing State v. Morse, 45 Wn. App. 197, 199, 723 P.2d 1209 (1986)). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999) (quoting State v. Cunningham, 96 Wn.2d 31, 34, 633 P.2d 886 (1981)).

The rules of evidence do not apply at restitution hearings. State v. Pollard, 66 Wn. App. 779, 784, 834 P.2d 51 (1992). Evidence supporting a restitution award is sufficient if it affords a reasonable basis for estimating loss without subjecting the trier of fact to “mere speculation or conjecture.” State v. Deskins, 180 Wn.2d 68, 82-83, 322 P.3d 780 (2014) (internal quotation marks omitted) (quoting State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005)).

Facts supporting a restitution award must be proved by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). Restitution is allowed only for losses that are “causally connected” to the crimes charged, meaning that, but for the charged crime, the victim would not have incurred the loss. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (internal quotation marks omitted) (quoting State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007)).

Here, the State presented evidence relating to the officer's injuries and treatment. The original information and statement of probable cause described

the assault on the officer and Gosney's subsequent flight from justice. It contained information that the officer received injuries to his shoulder, spine, face, neck, scalp, and leg. The trial court received an e-mail from the officer stating that the psychological therapy he received stemmed from those injuries. Furthermore, the trial court received an e-mail from the officer's psychiatrist, signed under penalty of perjury, stating that the treatment she provided was related to the assault. Additionally, the trial court received an e-mail from the third party adjudicator, confirming that the psychiatric treatment was related to the assault. Finally, the trial court received 30 pages of L&I documentation listing the date of injury applicable to the claim number, the medical treatments the officer received, the dates on which the treatments occurred, the treatment providers, and the cost of the treatments—all under a single claim number.

The L&I documentation was of particular import. In order to receive any compensation for medical treatments resulting from a work place injury, an injured worker must follow specific documentation rules promulgated by the Department of Labor and Industries pursuant to its statutory authority under Title 51 RCW.

These rules provide, in pertinent part, that:

The first attending provider must immediately complete and forward a report of the injury or illness to the department or self-insurer and instruct and assist the injured worker in completing his/her portion of the report of the injury or illness. In filing a claim, the following information is necessary so there is no delay in adjudication of the claim or payment of compensation.

- (a) Complete history of the work related accident or exposure.
- (b) Complete listing of positive physical findings.

- (c) Specific diagnosis with the current federally adopted ICD-CM code(s) and narrative definition relating to the injury.
- (d) Type of treatment rendered.
- (e) Known medical, emotional or social conditions which may influence recovery or cause complications
- (f) Estimate time-loss due to the injury or illness.

WAC 296-20-025(3).

To receive compensation for wage loss, an employee must also follow the above provisions of WAC 296-20-025(3). Wage loss is compensated pursuant to the rules in RCW 51.32.090 and 51.32.060, pertaining to temporary disability from a work-related injury.

The trial court indicated that it was familiar with L&I procedures and L&I ledgers. The fact that the trial court had experience with L&I claims indicates that the trial court understood the particular showing required to successfully assert a claim for L&I benefits. This includes the requirement that the injured worker and his physician provide "[c]omplete history of the work related accident," "[c]omplete listing of positive physical findings," and "[s]pecific diagnosis," before any claim may be paid. WAC 296-20-025(3) (emphasis added). The fact that the Department of Labor and Industries paid the officer's claims gives rise to an inference that the payments were made according to the law. The trial judge was entitled to credit this inference in deciding whether there was sufficient evidence of causation between Gosney's assault of the officer and the restitution amount claimed. This is so both as to the medical costs claimed and the wage losses incurred. While the documentation showed that the officer missed three days of work in the immediate aftermath of the assault, it also supported the court's

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conclusion that other work was missed as a result of the officer's need to attend medical appointments, treatment, and the like.

Gosney asserts that the evidence provided at the restitution hearing was "merely speculative." This assertion is without merit. The evidence was sufficient to afford the trial court a reasonable basis for estimating loss. Deskins, 180 Wn.2d at 82. In fact, the evidence established the losses with particularity. The detailed L&I ledgers set forth payments made for treatment all listed under a single claim number, with the first treatments beginning on the day Gosney assaulted the officer. See State v. Dennis, 101 Wn. App 223, 228, 6 P.3d 1173 (2000) (dated hospital bill coupled with testimony that defendant assaulted the officer on the same day was sufficient evidence that defendant caused the officer's injuries). Gosney provided nothing to refute the State's evidence. The only claim that was merely speculative was Gosney's assertion that the L&I payments might have been made contrary to law.

Gosney's citation to State v. Dedonado, 99 Wn. App. 251, 991 P.2d 1216 (2000), a per curiam opinion decided without the benefit of oral argument, does nothing to alter our analysis. That case dealt with payments made by a private insurer—not payments made by the government pursuant to a detailed, complicated statutory and regulatory scheme. The concerns addressed in that case do not here exist.

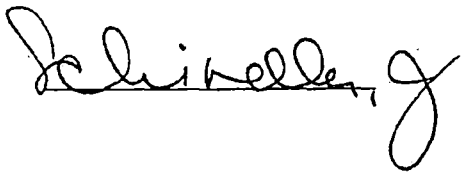
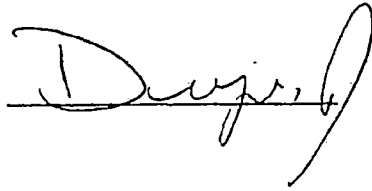
There was ample evidence from which the trial court could conclude that Gosney's criminal actions caused the medical expenses and wage loss incurred by the officer. There was no abuse of discretion.

III

Gosney argues that the court should not impose appellate costs against him because he is indigent. Should such a request be made, the issue is best addressed in accordance with recently amended RAP 14.2.

Affirmed.

We concur:



DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74416-0-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
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Date: May 24, 2017

WASHINGTON APPELLATE PROJECT

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