

66978-8

66978-8

NO. 66978-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LUIS COSGAYA-ALVAREZ,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB 16 PM 2:32

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS HILL

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIAN M. McDONALD
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
1. THE TRIAL COURT PROPERLY ORDERED RESTITUTION FOR LOST CHILD SUPPORT	4
a. Cosgaya-Alvarez Has Waived Any Challenge To The Trial Court's Decision To Order Restitution For Lost Child Support	4
b. The Trial Court Properly Awarded Restitution For Lost Child Support	7
2. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN SETTING THE AMOUNT OF RESTITUTION	11
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington v. Recuenco, 548 U.S. 212,
126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)..... 12

Washington State:

In re Goodwin, 146 Wn.2d 861,
50 P.3d 618 (2002)..... 5

State v. Barr, 99 Wn.2d 75,
658 P.2d 1247 (1983)..... 8

State v. Danis, 64 Wn. App. 814,
826 P.2d 1096 (1992)..... 5

State v. Davison, 116 Wn.2d 917,
809 P.2d 1374 (1991)..... 7, 9

State v. Griffith, 164 Wn.2d 960,
195 P.3d 506 (2008)..... 14

State v. Hughes, 154 Wn.2d 118,
110 P.3d 192 (2005)..... 12

State v. Kinneman, 155 Wn.2d 272,
119 P.3d 350 (2005)..... 6, 12

State v. Lewis, 57 Wn. App. 921,
791 P.2d 250 (1990)..... 10, 11

State v. Moen, 129 Wn.2d 535,
919 P.2d 69 (1996)..... 6

State v. Nitsch, 100 Wn. App. 512,
997 P.2d 100 (2000)..... 6

<u>State v. Pierson</u> , 105 Wn. App. 160, 18 P.3d 1154 (2001).....	5
<u>State v. Tobin</u> , 161 Wn.2d 517, 166 P.3d 1167 (2007).....	6, 7, 12
<u>State v. Young</u> , 63 Wn. App. 324, 818 P.2d 1375 (1991).....	5, 8, 9, 11

Statutes

Washington State:

RCW 9.94A.140	9
RCW 9.94A.142	10
RCW 9.94A.753	7, 10, 14

Other Authorities

Sentencing Reform Act	8, 9
-----------------------------	------

A. ISSUES PRESENTED

1. Whether defendant Luis Cosgaya-Alvarez has waived his challenge to the trial court's decision to award restitution for lost child support because at the restitution hearing he agreed that the court could order restitution for lost child support.

2. Whether the trial court properly ordered Cosgaya-Alvarez to pay restitution for lost child support.

3. Whether the trial court acted within its discretion in setting the amount of restitution for lost child support.

B. STATEMENT OF THE CASE

On August 14, 2008, Omero Mendez went to Lakota Junior High School in order to pick up his girlfriend's son. CP 39.¹ A black Lincoln Navigator, containing three men, entered the parking lot and blocked Mendez's car. Id. Cosgaya-Alvarez was sitting in the back seat of the Navigator and began flashing gang signs. CP 39-41. After a short argument between Mendez and the men in the Navigator, Cosgaya-Alvarez pulled a blue bandana over his face and shot Mendez. Id. Mendez died from the gunshot wound. Id.

¹ The facts of the crime are set forth in the certification for determination of probable cause. CP 39-43. Cosgaya-Alvarez stipulated to these facts as part of his plea agreement. CP 46.

On June 18, 2010, Cosgaya-Alvarez pled guilty to one count of second-degree murder and a firearm enhancement. CP 23-33; 1RP 2-14.² As part of the plea agreement, he agreed to pay restitution in full to the victims of the crime. CP 46. At the sentencing hearing, the court imposed a standard range sentence of 216 months. CP 52-54.

Mendez had three children. 2RP 7. He paid \$600 in child support a month to Crystal Morgan for two of his children. CP 82-84. At the restitution hearing, the State requested that the trial court order restitution, including \$100,200 for lost child support payments. CP 70; 2RP 35.

In response to the State's request for restitution, Cosgaya-Alvarez's attorney stated, "[I]n concept we do not object to any of these," and acknowledged that the court could order restitution for lost child support. 2RP 35-36. However, defense counsel contested the amount requested for lost child support, arguing that the State's requested amount did not take into account the present value of money. 2RP 36-37. Instead, Cosgaya-Alvarez's attorney,

² The report of proceedings consists of 2 volumes: 1RP refers to the transcript containing the hearing on June 18, 2010, and 2RP refers to the transcript containing the hearings on August 6, 2010, January 13, 2011, and March 11, 2011.

using an annuity calculator, argued that the correct amount should be approximately \$68,000. 2RP 37-38. In response, the prosecutor noted that Cosgaya-Alvarez could not pay the restitution immediately and that it was unlikely he would make sufficient money to pay it while he was in prison. 2RP 39-40. The prosecutor further noted that the court could order restitution up to twice the amount of the loss to the victim. 2RP 41.

The trial court engaged in a back and forth discussion with defense counsel, noting that his proposal was based upon an assumption that the amount would be placed in an annuity that paid 12 percent interest a year. 2RP 46. The court stated, "I have nothing before me that convinces me that there is an annuity in the marketplace that will pay 12 percent...." 2RP 46. The trial judge noted that she had the discretion to award more than the present day value of the lost child support and ordered Cosgaya-Alvarez to pay \$100,200 in restitution. 2RP 49-50; CP 59-60.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ORDERED RESTITUTION FOR LOST CHILD SUPPORT.

Cosgaya-Alvarez argues that the trial court cannot order restitution for lost child support. However, at the restitution hearing, he affirmatively agreed that the trial court could order restitution for lost child support, and therefore, this Court should hold that he has waived any challenge on appeal to the trial court's decision to order such restitution. Moreover, Cosgaya-Alvarez's claim fails on the merits; controlling caselaw clearly establishes that the trial court has the authority to award restitution for lost child support. The trial court did not err in ordering such restitution in this case.

a. Cosgaya-Alvarez Has Waived Any Challenge To The Trial Court's Decision To Order Restitution For Lost Child Support.

Cosgaya-Alvarez affirmatively agreed that the trial court could order restitution for lost child support; he contested only the amount to be awarded. Accordingly, he cannot now challenge the trial court's decision that the restitution order should include lost child support.

Directly on point is State v. Young, 63 Wn. App. 324, 818 P.2d 1375 (1991). In Young, before the trial court, Young's attorney stated that Young "accept[ed] the fact that the child support obligation are a legitimate aim of restitution ... I'm not saying that there shouldn't be an award of child support." Id. at 330. However, on appeal, Young challenged the award for child support, and the Court of Appeals held that his claim was waived. "By these remarks, Young agreed to pay child support, and he invited any error embodied in the resultant order requiring him to do that." Id.; see also State v. Pierson, 105 Wn. App. 160, 167, 18 P.3d 1154 (2001) (holding that defendant waived his challenge to a restitution order because he stipulated to the amount at the restitution hearing); State v. Danis, 64 Wn. App. 814, 822, 826 P.2d 1096 (1992) (refusing to consider defendant's challenge to lost overtime in the restitution order because there was no objection to it at sentencing).

Young is consistent with the general rule that there can be a waiver on a sentencing issue "where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion." In re Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). For example, in State v.

Nitsch, 100 Wn. App. 512, 997 P.2d 100 (2000), this Court held that a defendant who affirmatively agrees with the calculation of his standard range at sentencing has waived any argument on appeal that two offenses constituted the same criminal conduct. Unlike a claim of a pure legal error regarding scoring of offenses, this Court observed that the failure to raise the same criminal conduct issue "is a failure to identify a factual dispute for the court's resolution and a failure to request an exercise of the court's discretion." Id. at 520.

Similarly, here, the decision whether to impose restitution is a discretionary trial court decision and may require the resolution of factual matters. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007); State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).³ When the defendant agrees that the trial court has the discretion to award restitution for a particular loss, he has waived any claim on appeal that such an award is inappropriate. This Court should hold that because Cosgaya-Alvarez agreed the trial court should award restitution for lost child support, he cannot challenge that decision on appeal.

³ While the case cited by Cosgaya-Alvarez, State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996), involved restitution, the issue on appeal did not involve a matter subject to the trial court's discretion or the resolution of factual matters. Instead, it involved a timeliness challenge to a restitution order. Id. at 542-48.

b. The Trial Court Properly Awarded Restitution For Lost Child Support.

The trial court's authority to order restitution is derived entirely from statute. Tobin, 161 Wn.2d at 523. The legislature intended "to grant broad powers of restitution" to the trial court. State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991). Recognizing that the restitution statutes were intended to require the defendant to face the consequences of his criminal conduct, the Washington Supreme Court has held that "[w]e do not engage in overly technical construction that would permit the defendant to escape from just punishment." Tobin, 161 Wn.2d at 524. A trial court's order of restitution will not be disturbed on appeal absent an abuse of discretion. Id. at 523

The relevant restitution statute provides:

[R]estitution 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.

RCW 9.94A.753(3).

Cosgaya-Alvarez argues that lost child support does not qualify as property and is not easily ascertainable. In Young, supra, the Court of Appeals rejected both arguments and held that the trial court could order restitution for lost child support in a criminal case. In Young, the court noted that in a pre-Sentencing Reform Act case, State v. Barr, 99 Wn.2d 75, 658 P.2d 1247 (1983), the Supreme Court had affirmed the trial court's decision in a negligent homicide case to order the defendant to pay lost child support. Young, 63 Wn. App. at 332. The Young court noted the similarities in the language in the SRA's restitution statute and the statute at issue in Barr, which allowed for restitution "to any person who may have suffered loss or damage." Id. at 332-33. The court then concluded that the "loss of child support payments is 'loss' for purposes of restitution." Id. at 333.

Young rejected the argument, made by Cosgaya-Alvarez, that lost child support is not property, explaining:

Young argues that the "statutory duty of Mr. Pelham to support his children was not in any sense 'property.'" The issue, however, is not whether Pelham's duty to pay child support is "property;" rather, it is whether his children's corresponding right to receive support is "property." More importantly, the issue is not whether a child's right to receive support from a parent is "property" before that right is reduced to judgment. Because the right here had merged in a

judgment requiring payments of \$250 per month, the issue is whether a judgment requiring monthly child support payments is "property" for purposes of the restitution provisions of the SRA. We hold that a judgment for child support payments is "property" for purposes of RCW 9.94A.140, and that causing the death of the judgment debtor causes a "loss of property" for purposes of the same statute.

Id. at 331; see also Davison, 116 Wn.2d at 918 (upholding restitution award for lost wages in an assault case).

Young also rejected Cosgaya-Alvarez's argument that lost child support payments are not "easily ascertainable." The court explained:

[L]oss of future child support payments previously reduced to judgment constitutes "easily ascertainable damages" within the meaning of the statute. The amount of such loss depends primarily on two factors: the terms of the judgment, and whether the children are still dependents. Each of those matters is simple to ascertain, and once each is known, the criminal court is in a position to set restitution insofar as lost child support is concerned.

63 Wn. App. at 332.

As in Young, the evidence submitted in this case established the existence of a judgment requiring Mendez to make payments of \$600 a month for his two children. CP 82-83. This judgment for child support payments qualified as "property" under RCW 9.94A.753, and the death of Mendez caused a "loss of property" for

purposes of the restitution statute. In addition, the amounts payable as child support were easily ascertainable: the monthly amount of child support was set forth in the court's order and the number of months of lost child support was easy to calculate and not in dispute. CP 82-84.

The case cited by Cosgaya-Alvarez, State v. Lewis, 57 Wn. App. 921, 791 P.2d 250 (1990), is distinguishable; it involved an award for future earnings loss, which involves a more complex analysis. In Lewis, the trial court ordered Lewis to reimburse a life insurance company for \$50,000 paid to the victim's estate as future earnings losses. The Court of Appeals vacated the award and held that future earnings loss was not "easily ascertainable" damages.

The facts here aptly illustrate the complexity involved in calculating future earnings losses. At the time of her death, the victim was 42 years old and earning \$30,000. In the civil context, many variables would appropriately factor into the determination of Mrs. Primacio's "lost future earnings". The court would consider evidence of Mrs. Primacio'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. Such evidence is normally the subject of extensive expert testimony in civil damage actions, and the final decision is a judgment call, often difficult to make. Such a determination is hardly "easily ascertainable".

Id. at 924.

As reflected in Young and in this case, lost child support payments do not involve the same complex considerations that must be considered when determining future earnings loss. The amount of the monthly child support payment was set forth in the court's order, and number of lost payments could be easily determined.

The award of lost child support is consistent with the legislature's intent to grant broad powers of restitution to the trial court. Here, there can be no question that Mendez's children suffered not just emotional trauma due to the sudden death of their father, but also a significant loss of property because their father would no longer contribute financially to their upbringing. Consistent with settled caselaw, the trial court properly ordered Cosgaya-Alvarez to pay restitution for lost child support.

2. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN SETTING THE AMOUNT OF RESTITUTION.

Cosgaya-Alvarez also challenges the amount of restitution awarded for lost child support. He complains that the court's award failed to take into account the present day value of the future child support payments. However, because it was readily apparent that

Cosgaya-Alvarez could not pay restitution for lost child support until sometime in the future, the trial court acted within its discretion in declining to base the amount on the present day value of the lost child support. Moreover, the court had the authority to award up to double the amount of the lost child support, and the trial court indicated that it was exercising its discretion to award more than the exact loss when setting the amount of restitution.

Absent agreement from the defendant as to the amount of restitution, the State must prove the amount by a preponderance of the evidence. Tobin, 161 Wn.2d at 524. While restitution must be based on "easily ascertainable damages," the amount of loss need not be established with specific accuracy. Kinneman, 155 Wn.2d at 285. 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. State v. Hughes, 154 Wn.2d 118, 154, 110 P.3d 192 (2005), abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Here, the State proposed that the trial court order the amount of \$100,200. This amount was calculated by multiplying the amount of the monthly payments for each child (\$300 for each

child) by the number of months between the date of Mendez's death and each child's 18th birthday. CP 84. This was a reasonable method of determining the total amount of lost child support.

At the restitution hearing and on appeal, Cosgaya-Alvarez argues that the State's calculations failed to take into account the present value of the future child support payments. Using an annuity calculation, Cosgaya-Alvarez's attorney proposed that the court order \$67,687. 2RP 37-38. Though he acknowledged that this proposal was based upon the assumption that this amount would be deposited into an account and begin earning interest immediately, he never suggested that Cosgaya-Alvarez had the ability to make such a payment. 2RP 38. In fact, it was highly improbable that Cosgaya-Alvarez would pay anything in the near or distant future, given that he was represented by a public defender, had no assets or income, and was sentenced to 18 years in prison. CP 54, 86-90. The trial court did not err in declining to award the amount proposed by Cosgaya-Alvarez's attorney.

The trial court had the discretion to award an amount that exceeded the present day value of the lost child support. A court can, in its discretion, order restitution up to double the amount of

the victim's loss. RCW 9.94A.753(3); State v. Griffith, 164 Wn.2d 960, 966, 195 P.3d 506 (2008). Here, the trial judge stated that she was exercising her discretion to award more than the present day value of the lost child support. 2RP 49. Such a decision was not an abuse of discretion.

D. CONCLUSION

For the reasons cited above, this Court should affirm the restitution order.

DATED this 16th day of February, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
BRIAN M. McDONALD, WSBA #19986
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. LUIS COSGAYA-ALVAREZ, Cause No. 66978-8-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.



Name
Done in Seattle, Washington

02/16/12

Date