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NO. 68020-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent/ Cross-Appellant,

v.

MICHAEL EMERIC MOCKOVAK,

Appellant/ Cross-Respondent.

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COURT OF APPEALS
DIVISION ONE

MAR 11 2013

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON
THE HONORABLE MICHAEL HAYDEN

REPLY BRIEF OF RESPONDENT/ CROSS-APPELLANT

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DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent/ Cross-Appellant

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

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A. STATEMENT OF THE CASE IN REPLY

The State disputes Mockovak's characterization of the legal and consulting expenses sought as restitution in this case. The details of the professional expenses incurred (with the exception of the medical expenses) were not established in the trial court because the trial court ruled that as a matter of law, the expenses could not be compensable. 21RP 20, 29.

The request for restitution for professional expenses described "Legal Expenses" as follows: "Dr. King has retained law firms (and one PR firm) to advise him during the criminal proceedings and to help him recover damages related to Mr. Mockovak's conduct." CP/R 272. The restitution request further explained:

Due to Dr. King's required attendance at trial, Dr. King's company, Clearly Lasik, was forced to pay a surgeon to conduct surgeries in Dr. King's absence. Clearly Lasik also hired a public relations firm to ameliorate the harmful effects of Defendant's conduct and very public trial on the business.

Dr. King and his companies also incurred legal fees. Dr. King hired attorneys to assist with witness preparation and other aspects of Defendant's criminal trial. Dr. King and his business also hired a law firm to help them pursue civil claims for damage caused by Defendant's crimes. All of these expenses are direct results of Defendant's crimes and would not have been incurred but for their commission.

CP/R 222.

The detailed listing of expenses in Mockovak's brief is supported by a citation to a document that is only a list of the amounts requested, the service provider, and the broad type of service. Appellant's Consolidated Brief at 15-16, citing CP/R 274-75. For example, for the services of each of the law firms, every entry is described only as "legal." CP/R 274-75. The description of services in each invoice attached to the restitution request is redacted. CP/R 289-350.

For details of the civil suits pursued by King and his family, and by Clearly Lasik,¹ Mockovak later cites civil pleadings attached to his own brief opposing the restitution request. Appellant's Consolidated Brief at 19-20. The civil pleadings were not accepted as determinative facts by the trial court – no evidentiary hearing was conducted. 21RP 20, 29.

Moreover, Mockovak provides only an incomplete statement of the causes of action and requests for relief represented in those pleadings. As to the lawsuit filed by the business against Mockovak, it was not limited to recovering business losses due to negative publicity, as Mockovak now asserts. Appellant's Consolidated Brief at 15. The suit also alleged that Mockovak was

¹ The State will use the name "Clearly Lasik" to encompass both King and Mockovak Eye Center, Inc., P.S. and Clearly Lasik, Inc.

an imminent threat to King, Brad Klock, and to everyone associated with the business, including employees, officers, and customers.² CP/R 35. In addition to monetary damages, the suit sought injunctive relief: prohibiting Mockovak (who was out on bail pending trial) from: entering any Clearly Lasik facility; contacting any Clearly Lasik employee, supplier, creditor, customer, or financial institution; selling corporate assets or withdrawing corporate funds; and interfering with corporate activities in any way. CP/R 36-38. The current status of that suit is not a matter of record in this case.

At the restitution hearing, King asserted that the costs requested included costs incurred to protect King, his family, and his employees immediately after Mockovak's arrest (and release). 21RP 27. The judge concluded that even this category of costs would not be recoverable as restitution. 21RP 28-29.

Mockovak is incorrect when he claims that the fees on the accounting documents attached to his brief in the trial court establish that at least \$120,000 of the total of \$147,300 in attorneys' fees requested as restitution is attributable to the Clearly

² The criminal charges and a summary of the facts underlying the charges was included by attaching a copy of the Information in the criminal case and of the detailed certification for determination of probable cause and case summary. CP 40-57.

Lasik lawsuit. See Appellant's Consolidated Brief at 32. Mockovak asserts that accounting documents provided in the civil suit establish that Clearly Lasik paid \$120,000 in legal fees in connection with this lawsuit; the cited page shows only \$12,000 in legal fees in 2009. Compare Appellant's Consolidated Brief at pages 19 and 32, citing CP/R 60, with CP/R 60. A later page of the document does show that KMEC paid \$121,000 in legal fees in 2009. CP/R 62. Neither page specifies the services provided or the provider of the services. CP/R 60, 62. Because Mockovak was not arrested until November 12, 2009, most of the fees incurred in 2009 probably related to the ongoing lawsuit of Brad Klock against Clearly Lasik for unlawful termination, and the dissolution of Clearly Lasik being negotiated before the crimes occurred. See CP/R 43 (Klock suit filed 1/14/2009); CP/R 46 (in August 2009, Mockovak discussed plans to split the business that fall). The legal fees sought as restitution accrued only after King was informed of the murder plot. CP/R 51 (King returned from Australia by 11/15/09); CP/R 274, 290 (first legal fees from Corr Cronin are 11/16/09, \$51,000 accrued in 2009).

B. ARGUMENTS IN REPLY

The State's argument in its cross-appeal is that the trial court limited its restitution order based on an incorrect interpretation of the restitution statute and that the travel expenses, the expenses to repair the damage to the public image of the business, and legal expenses requested as restitution all could have been causally related to the crimes and compensable as restitution. The thrust of Mockovak's response is first, that a business that is not a direct victim of the crimes cannot recover restitution, and second, that the expenses were not shown to be causally related to the crimes. The first contention is legally incorrect; the second is irrelevant because the trial court did not allow an evidentiary hearing to establish causation. Finally, Mockovak's claim that restitution cannot be awarded if the victim could have chosen to forego the expense is contrary to the law and the policy of the restitution statute.

1. A COURT MAY ORDER RESTITUTION TO A BUSINESS THAT IS NOT THE DIRECT VICTIM OF A CRIME BUT SUFFERS INJURY AS A RESULT OF THE CRIME.

Mockovak claims that the legal expenses and public relations expenses that were paid by Clearly Lasik are not

recoverable because they are not King's personal expenses. He goes so far as to suggest tax fraud based on King's request for restitution for fees paid to the Corr Cronin law firm. Appellant's Consolidated Brief at 34. King did not conceal the fact that these losses were incurred by the business that he co-owned with Mockovak, as the invoices that King submitted specify that. CP 290-328. As the owner of Clearly Lasik, it is logical that he seeks compensation for losses to that business as well as his personal expenses; the court can direct the restitution for expenses incurred by the business to be paid directly to the business.

A business that suffers a loss by spending funds can be awarded restitution even if it the business is not the direct victim of the crime and even if the business is not legally obligated to incur the expense. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007); State v. Davison, 116 Wn.2d 917, 921-22, 809 P.2d 1374 (1991). See also State v. Johnson, 69 Wn. App. 189, 193-95, 847 P.2d 960 (1993)(restitution was properly awarded for money that victim paid to friends who helped review the books and determine the amount of embezzlement, even though victim was not obliged to pay the friends anything). In this case, Judge Hayden assumed

for purposes of his ruling that the business suffered harm related to these crimes. 21RP 20.

To the extent that King personally or through his business incurred expenses to protect employees of Clearly Lasik from Mockovak, those expenses were reasonably related to Mockovak's effort to hire hit men to murder King. The trial court's ruling that only expenses to repair or recover property could be recovered is an unreasonable interpretation of the law, as explained in the State's Brief of Respondent.

Criminal attempt and criminal solicitation both are crimes, and may cause damages recoverable as restitution. RCW 9A.28.020, 9A.28.030. Mockovak cites no authority for the proposition that restitution may not be recovered for the attempted commission of an offense or solicitation to commit a crime. An attempted murder, for example, may cause grave physical harm to the victim; the medical expenses are no less real and recoverable because the murder was not completed. Likewise, solicitation to commit murder may result in harm to the intended victim, even though the murder is not completed. Mockovak appears to concede as much in his discussion of expenses that King incurred

because of his unplanned precipitous return to the United States after learning of the plot. Appellant's Consolidated Brief at 37.

Mockovak's argument that there was no reason to incur expenses for protection of King, his family, or employees, is premised on the statement that Mockovak "was in jail even before the time the Kings left Australia." Appellant's Consolidated Brief at 37. There are two flaws in this proposition. First, because Mockovak already had demonstrated that he would hire others to do the killing that he considered necessary, Mockovak's incarceration was no guarantee of security. Second, there was no guarantee that Mockovak would not post bail; he did post two million dollars bail within weeks (December 7, 2009) and was released to the community. CP/R 351.

Mockovak's argument that no legal expenses related to the suit brought by Clearly Lasik can be recovered also is without merit. The argument fails because it assumes facts that have not been developed. It is premised on the assertion that the legal fees were incurred in an effort to recover losses to the business caused by negative publicity. Appellant's Consolidated Brief at 31. However, the legal fees sought were not limited to the firm handling that suit and the scope of the legal services provided has not been

established. The document Mockovak attached to his trial court pleading, which purports to be the original complaint in that suit, includes requests for injunctive relief intended to protect the Kings, the business facilities, the employees and patients. CP 36-38.

State v. Woods, 90 Wn. App. 904, 953 P.2d 834 (1998), upon which Mockovak relies, does not limit restitution to compensation for the immediate effects of the acts upon which criminal liability is based. Woods held that a defendant charged with possession of a stolen vehicle cannot be ordered to pay restitution for the loss of personal property that had been in the car at the time it was stolen, because the later possession of the vehicle was not a but-for cause of the loss of the property. Id. at 909-11. The Supreme Court in State v. Hiett³ limited Woods, making it clear that Woods does not establish a restriction on restitution generally. The court held that because Hiett was convicted of the theft of a vehicle, restitution was properly ordered for loss of the personal property in that vehicle because the theft was the but-for cause of the loss of the property inside. Id. at 565-56. The court went further and found Hiett was properly ordered to pay restitution for damages caused by a codefendant's flight from

³ 154 Wn.2d 560, 115 P.3d 560 (2005).

the police (eluding a police vehicle) and crash of the stolen car into a truck and a store, all of which occurred after Hiett got out of the car. Id. at 562-67. Although Hiett argued that the codefendant's additional crimes were intervening causes of the damage, the court concluded that "an intervening act must be unforeseeable in order for it to break the causal chain." Id. at 566.

In the case at bar, Mockovak is arguing that any expenses are too attenuated from the crimes to be awardable as restitution. For that reason, his citation to State v. Miszak, 69 Wn. App. 426, 848 P.2d 1329 (1993), also is inapposite. In that case, the court held that the defendant was not responsible to pay restitution for 13 items of jewelry that had been stolen over a period of months, when he pled guilty to attempted theft of only one item. Id. at 428-30. The case did not involve expenses allegedly caused by the crimes of which the defendant was convicted, as in the case at bar.

2. MOCKOVAK'S ARGUMENTS THAT THESE EXPENSES WERE NOT ACTUALLY CAUSED BY THE CRIMES ARE PREMATURE, AS THE FACTS HAVE NOT BEEN DEVELOPED.

A number of Mockovak's arguments dispute whether specific expenses relate to harm actually caused by the crimes that he

committed. These claims are premature, because the facts relating to the claims aside from the cardiologist fees were not developed in the trial court. The trial court refused to conduct an evidentiary hearing. 21RP 20, 29.

For example, Mockovak argues that no business losses were proven. Appellant's Consolidated Brief at 30. As to that particular issue, the trial court specifically stated that it was ruling based on the assumption that the business was harmed. 21RP 20. It also is unclear why it would be relevant that King may owe Mockovak money related to the dissolution of the Clearly Lasik business, as the award of restitution is not intended to settle all debts between the defendant and the victim of his crimes.

As to the loss related to King's premature return from his Australian vacation, Mockovak argues that King did not establish exactly why and on what date he returned, so the payment of fees related to that return are not compensable. Appellant's Consolidated Brief at 36-38. It would be remarkable if King had not returned after being informed that Mockovak had tried to hire hit men to kill King in Australia. King was in Australia with his wife and three young children and could not be certain of the danger that Mockovak might pose, particularly as to whether there were other

criminal conspiracies not known to Daniel Kultin, either backup plans to harm King or other plans to harm Clearly Lasik employees, including Kultin. Further, it would be natural to return in an effort to protect the business jointly owned with the man who had plotted to murder King. If any explanation for that return was necessary, King was not given an opportunity to explain.

C. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm the restitution previously ordered in the amount of \$1543.34, reverse the legal conclusions reached by the trial judge as to the limited availability of restitution, and remand for fact finding as to the total amount of restitution owed.

DATED this 11th day of March, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Donna L. Wise
DONNA L. WISE, WSBA #13224

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 James E. Lobsenz, the attorney for the appellant, at Carney Badley Spellman, P.S., 701 Fifth Avenue, Suite 3600, Seattle, WA 98104-7010, containing a copy of the Reply Brief Of Respondent/ Cross-Appellant , in STATE V. MICHAEL MOCKOVAK, Cause No. 68020-0-1, 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

03-11-13
Date