

NO. 68571-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GUY ROOK,

Appellant.

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CLERK OF COURT
COURT OF APPEALS
DIVISION I
SEATTLE, WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether Rook has shown that he received ineffective assistance of counsel at the restitution hearing.

2. Assuming Rook has shown that he received ineffective assistance of counsel, whether the remedy is remand for a new restitution hearing at which further evidence may be presented.

B. STATEMENT OF THE CASE

PROCEDURAL FACTS

The defendant, Guy Rook, was convicted by a jury of vehicular assault and sentenced to life in prison without the possibility of parole under the Persistent Offender Accountability Act (POAA). Rook's appeal concerning his conviction and sentence has been filed under Court of Appeals No. 67572-9-1, which is linked for consideration with the instant appeal.

In this appeal, Rook challenges the restitution order that was entered by the trial court. The trial court's restitution order includes expenses incurred by the victim, Christopher Kalaluhi; his medical insurance provider, Premera Blue Cross; his dental insurance provider, Washington Dental; and Crime Victim's Compensation.

CP 23-24. The order was based on documentation provided by the victim and the State. CP 25-76.

At the restitution hearing, Rook's trial counsel did not contest any of the restitution that had been requested. RP (2/14/12) 3. The trial court signed the restitution order in reliance upon defense counsel's agreement. RP (2/14/12) 3; CP 23-24.

Rook now contends that his trial attorney rendered ineffective assistance of counsel at the restitution hearing, and raises numerous challenges to the trial court's restitution order. More specifically, Rook challenges the following: 1) the victim's medical expenses in 2010 and 2011; 2) emergency room expenses paid by Premera Blue Cross, which appear to have been awarded twice; 3) one of the victim's medical bills, dated 3/11/10; 4) the victim's pharmacy expenses; and 5) parking expenses at the hospital. See Appellant's Opening Brief.

C. ARGUMENT

1. THE STATE CONCEDES THAT ROOK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE RESTITUTION HEARING.

Rook first claims that his trial attorney rendered ineffective assistance of counsel at the restitution hearing. Appellant's

Opening Brief, at 6-10. The State concedes this issue, albeit solely on the basis of awarding \$18,387.09 for emergency room expenses to Premera Blue Cross twice. CP 45-46.

A criminal defendant has the constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 682, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The defendant bears the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To carry this burden, the defendant must meet both prongs of a two-part test. Specifically, the defendant must show: 1) that counsel's representation was deficient, meaning that it fell below an objective standard of reasonableness considering of all the circumstances (the "performance prong"); and 2) that the defendant was prejudiced, meaning that there is a reasonable probability that the result of the proceedings would have been different but for counsel's errors (the "prejudice prong"). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In this case, Rook claims a number of errors in the trial court's restitution order. See Appellant's Opening Brief, at 12-18. After reviewing the documentation submitted in support of the restitution order, the State agrees that the documentation shows that Premera Blue Cross was awarded \$18,387.09 twice for the same emergency

room expenses. CP 45-46. The failure to notice this error constitutes deficient performance, and it resulted in prejudice because Rook was ordered to pay substantially more restitution than it appears is actually owed.

2. THE REMEDY IS TO REMAND FOR A NEW RESTITUTION HEARING AT WHICH FURTHER EVIDENCE MAY BE PRESENTED.

Assuming that this Court accepts the State's concession, the remaining question for this Court is the appropriate remedy on remand. Rook argues that the remedy is to strike the portions of the restitution order that he claims are not supported by sufficient evidence or are otherwise not authorized.¹ Appellant's Opening Brief, at 18. Rook argues in the alternative that a new restitution hearing should be ordered on remand. Appellant's Opening Brief, at 9, 19. Under the circumstances presented in this case, the correct remedy is a new restitution hearing on remand, at which the

¹ For example, Rook argues that this Court should strike the victim's medical expenses from 2010 and 2011 because the State did not prove that they were causally related to the crash, which occurred in August 2009. Appellant's Opening Brief, at 12-14. But given the severity of the crash and the victim's resulting injuries, the fact that the victim received ongoing medical care is hardly surprising.

State may present additional evidence in support of the victim's claims.

Under RCW 9.94A.750(5), restitution may be imposed “whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property[.]” Although the statute requires that restitution must be based on damages that are “easily ascertainable,” the amount of loss need not be established with absolute accuracy. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005).

Moreover, an evidentiary hearing is necessary only if the defendant objects to the amount of restitution requested:

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.

Kinneman, 155 Wn.2d at 285 (emphasis supplied); *accord*, State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (“*If the defendant disputes the restitution amount, the State must prove the damages by a preponderance of the evidence.*”) (emphasis supplied). On the other hand, the trial court is entitled to rely on information that is admitted or acknowledged by the defendant in

imposing restitution. State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000).

In this case, Rook's trial counsel agreed to the restitution order proposed by the State, and stated that he was "not going to contest anything[.]" RP (2/14/12) 3. The trial court relied on defense counsel's acknowledgment, as it was entitled to do, and ordered restitution accordingly. RP (2/14/12) 3; CP 23-24. Although defense counsel committed an error in reviewing the medical documentation, this does not change the fact that there was no objection raised. Therefore, the State was not required to prove the damages by a preponderance of the evidence.

This Court should reject Rook's suggestion that the State has failed to meet its burden of proof regarding restitution, because the State was never required to do so. The appropriate remedy under the circumstances presented in this case is to remand for a restitution hearing, at which the State will have the opportunity to present further evidence as may be necessary to prove the victim's losses by a preponderance of the evidence.

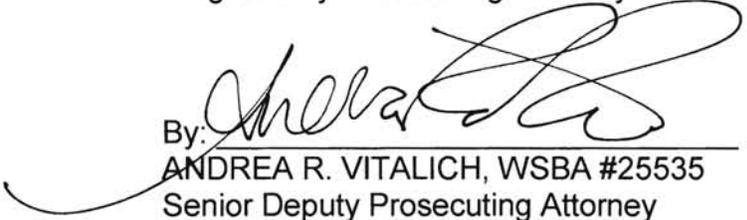
D. CONCLUSION

The restitution order should be reversed and the case remanded for a new restitution hearing, at which the State may submit additional evidence in support of the victim's claims.

DATED this 26th day of November, 2012.

Respectfully submitted,

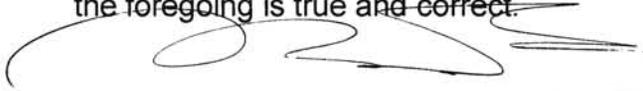
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Certificate of Service by Mail

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. GUY ROOK, Cause No. 68571-6-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



Date