

TABLE OF CONTENTS

I.	STATEMENT OF FACTS	1
II.	RESPONSE TO ASSIGNMENTS OF ERROR 1 AND 2.....	1
III.	RESPONSE TO ASSIGNMENT OF ERROR NO. 3.....	7
IV.	CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases

<u>In Re the Personal Restraint of Montoya</u> , 109 Wn.2d 270, 744 P.2d 340 (1987).....	2
<u>Mendoza v. Rivera-Chavez</u> , 88 Wn.App. 261, 272, 945 P.2d 232 (1977).....	2
<u>Montoya</u> , 109 Wn.2d at 280	2
<u>North Carolina v. Alford</u> , 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).....	1
<u>Pollard</u> , 66 Wn.App. at 785.....	5
<u>State v. Arnold</u> , 81 Wn.App. 379, 382, 914 P.2d 762 (1996).....	2
<u>State v. Blair</u> , 56 Wn.App. 209, 215, 783 P.2d 102 (1989).....	6
<u>State v. Dauenhauer</u> , 103 Wn.App. 373, 377, 12 P.3d 661 (2000).....	6
<u>State v. Harrington</u> , 56 Wn.App. 176, 180, 782 P.2d 1101 (1989).....	6
<u>State v. Hunotte</u> , 69 Wn.App. 670, 676, 851 P.2d 694 (1993)	6
<u>State v. Kinneman</u> , 155 Wn.2d 272, 282-285, 119 P.3d 350 (2005).....	5
<u>State v. Newton</u> , 87 Wn.2d 366, 372, 552 P.2d 682 (1976)	1
<u>State v. Newton</u> , 87 Wn.2d at 370	2
<u>State v. Pollard</u> , 66 Wn.App. 779, 785, 834 P.2d 51 (1992).....	5

<u>State v. Price</u> , 126 Wn.App. 617, 635, 109 P.3d 27 (2005).....	2
<u>State v. Vinyard</u> , 50 Wn.App. 888, 894, 751 P.2d 339 (1988).....	6

Rules

ER 801(d)(2).....	2
-------------------	---

Statutes

Chapter 9.94A. RCW.....	7
RCW 43.43.754	7
RCW 43.43.7541	7
RCW 9.94A.030(28)	7

I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the defendant in the Brief of Appellant. Where additional information is necessary, it will be supplemented in the argument portion of the brief.

II. RESPONSE TO ASSIGNMENTS OF ERROR 1 AND 2

The two primary assignments of error deal with the restitution hearing after the court accepted the defendant's plea of guilty to Assault in the Fourth Degree.

Although it was referred to as a Newton plea, it is actually an Alford plea that was entered by the defendant.

In North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), the U. S. Supreme Court held that the defendant may plead guilty while disputing the facts alleged by the prosecution. Washington adopted an Alford plea in State v. Newton, 87 Wn.2d 366, 372, 552 P.2d 682 (1976). The basic standard for determining validity of an Alford plea is whether it

represents a voluntary and intelligent choice among the alternative courses of action open to a defendant. In Re the Personal Restraint of Montoya, 109 Wn.2d 270, 744 P.2d 340 (1987). Under Alford, a defendant may plea guilty without admitting guilt, as long as there is a factual basis to believe he committed the crime charged. Montoya, 109 Wn.2d at 280. A factual basis exists if there is sufficient evidence from which a jury could conclude the defendant is guilty. State v. Newton, 87 Wn.2d at 370; State v. Arnold, 81 Wn.App. 379, 382, 914 P.2d 762 (1996).

An Alford plea is an admission of guilt under ER 801(d)(2). Mendoza v. Rivera-Chavez, 88 Wn.App. 261, 272, 945 P.2d 232 (1977); State v. Price, 126 Wn.App. 617, 635, 109 P.3d 27 (2005). In our case, the defendant made it clear to the court that he was pleading guilty to accept the benefit of a bargain of a reduction of the sentence from possible felony assault to an assault in the fourth degree (RP 8).

The prosecutor set forth the factual basis to support the plea to the assault. The basis was as follows:

“(MS. HART – DEPUTY PROSECUTOR): Your Honor, basically what happened is the defendant is involved in an altercation. He gets in a fight with another Hispanic male, inside the tavern.

That fight then moves outside the tavern. Outside the tavern, the victim, Dan Newstad, is waiting for a taxi. Witnesses for the State would indicate (1), being Ken Ecker, that he's there and he's trying to break up the fight, and outside there's nobody out there except for the defendant and the defendant's – the other person he's fighting with which is this Hispanic male.

So at that point, Ken is trying to pull them apart. He's pulling the Hispanic male off the victim, then Dan Newstad gets – tries to separate the two and at that point the defendant turns and knees him, knees Dan Newstad in his knee and blows it out to the side, basically tears his – dislocates his knee, and he goes down to the ground. That's why there's \$12,000.00 because he had to have a bunch of physical therapy and stuff.

Now, since that time, some other witnesses were going to come forward and say that the defendant did not do that. My witnesses say that he did do that. Some people had been drinking., somehow the jury very well could discount the defendant's witnesses as biased since they were with him that night. My witnesses are simply independent.

So I think this was a good resolution in the sense that he's pleading and taking responsibility and that the jury could find him guilty of a more serious offense.“ (RP 6, L. 17--7, L. 24).

With that background in mind, the restitution hearing was conducted on October 21, 2005. The State called Kenneth Ecker who testified about what he observed that evening. On cross-examination, the defense attorney was attempting to impeach the witness by, what the defense has maintained, is a prior inconsistent

statement. The court cut the defense attorney off because it appeared that the defense was trying to argue that the defendant didn't have anything to do with this. In fact, the court pointedly asked the defense attorney:

“THE COURT: So you think you can present evidence that he didn't commit the offense?”

ANSWER: (MR. BRINTNALL):
That's my understanding, yes.”

(RP 22, L. 1-3).

The State submits that the trial court properly cut this line of defense off and further indicated that at the restitution hearing, the issue really was the nature of the injuries and the amount of monetary loss. Because of the plea of guilty, an admission, the prior inconsistent statement, if it existed, became irrelevant.

By stipulation between the parties (RP 23), the State presented the following documentation:

“1. A breakdown of the crime victim's compensation that was paid out to cover Dan Newstad's wage loss due to the injury. The doctors would not release him to go back to work and he was out the lost wages

2. Medical records of Dan Newstad which show that the injury was all related to the assault in question which happened on January 8.

3. Billings from Southwest Washington Medical Center that showed that the hospital incurred costs of a \$1,000.00 that had not been paid, directly related to the assault of January 8.

4. The emergency medical response report that established that there were injuries on January 8 to Dan Newstad. (Mr. Newstad was not present because he was in Phoenix, Arizona for sixteen months and the election was made not to fly him back to the state of Washington for the purposes of the restitution hearing. The defense was in agreement with that.) (RP 24-25).

The court found the total restitution to be in the amount of \$16,036.08. A trial court has discretion to determine the amount of restitution. State v. Pollard, 66 Wn.App. 779, 785, 834 P.2d 51 (1992). The appellate court will find an abuse of discretion only if the decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Pollard, 66 Wn.App. at 785. If the amount of damages is shown by “substantial, credible evidence”, the trial court did not abuse its discretion. Pollard, 66 Wn.App. at 785. The restitution statute allows the trial court considerable discretion in determining restitution. The Court can find anything from 0 on up to double the offender’s gain or the victim’s loss. The State need prove damages only by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 282-285, 119 P.3d 350 (2005).

Restitution is proper when a causal connection exists between the crime and the injuries for which compensation is sought. State v. Vinyard, 50 Wn.App. 888, 894, 751 P.2d 339 (1988). In deciding whether a restitution order is within the trial court's statutory authority, the appellate court uses a "but for" factual test to evaluate the causal link between the criminal acts and a victim's damages. State v. Hunotte, 69 Wn.App. 670, 676, 851 P.2d 694 (1993); State v. Blair, 56 Wn.App. 209, 215, 783 P.2d 102 (1989); State v. Harrington, 56 Wn.App. 176, 180, 782 P.2d 1101 (1989).

The restitution statute confers broad power on the trial court to order restitution. State v. Dauenhauer, 103 Wn.App. 373, 377, 12 P.3d 661 (2000). The State submits that there has been a causal connection proven between the crime charged and the victim's damages. This was done by the recitation of facts at the time of the change of plea, the testimony at the time of the restitution hearing and the stipulated documentation that supports the amount of loss. The evidence clearly establishes that "but for" the assault that blew out the victim's knee, there would have been no loss. It's the defendant's conduct and activities on the evening of the assault that led directly to the loss of income and the medical

expenses that the trial court ordered. There has been absolutely no showing that the trial court abused its discretion in awarding restitution in this case.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is that the trial court did not have authority to order the defendant to pay a DNA processing fee. The fee in question is \$100.00.

The DNA identification system collection of biological sample fee provision is provided under RCW 43.43.7541. Under that statute, it indicates that the \$100.00 fee can be collected for every sentence imposed under Chapter 9.94A. RCW, and seems to indicate that it is limited also to the felonies under RCW 43.43.754. Further, when we look at “legal financial obligations” under RCW 9.94A.030(28), it appears that they are limited to felonies.

Finally, this assault in the fourth degree does not fit under any of the special criteria for domestic violence or sexual assaults.

With that in mind, it does not appear that the \$100.00 fee is appropriate.

IV. CONCLUSION

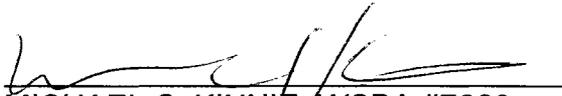
The rulings at the restitution hearing were properly made by the trial court. The amount of restitution that was set was done so after the State had proven by a preponderance of the evidence the amount sought. The State submits the trial court properly ruled on the questions of restitution and should be affirmed in that regard.

DATED this 19 day of July, 2006.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNE, WSBA #7869
Senior Deputy Prosecuting Attorney

FILED
COURT OF APPEALS

05 JUL 26 PM 12:41

CMH

IN THE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,
Respondent,

No. 34118-2-II

v.

Clark Co. Cause No. 05-1-00113-5

DOUGLAS MICHAEL SILVA,
Petitioner.

DECLARATION OF TRANSMISSION
BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On July 20, 2006, I deposited in the mails of the United States of America properly stamped and addressed envelopes directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

DATED this 20th day of July, 2006.

	Douglas Michael Silva 12905 NE 73 rd Street Vancouver, WA 98682	John A. Hays Attorney at Law 1402 Broadway, Suite 103 Longview, WA 98632
TO:	David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	

DOCUMENTS: BRIEF OF RESPONDENT

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Carole D. Appert
Date: July 20, 2006.
Place: Vancouver, Washington.