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COURT OF APPEALS
DIVISION II

NO. 37254-1-II

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STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL THOMAS McKNIGHT,

Appellant.

APPELLANT'S BRIEF

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I. Assignments of Error

1. The trial court erred in ordering \$3276.19 in restitution.
2. The Trial Court abused its discretion by entering an order of restitution for costs related to a fractured jaw when the Jury found Mr. McKnight not guilty of the crime of Assault in the Second Degree.

II. Issues Pertaining to Assignments of Error

1. The Trial Court exceeded its statutory authority in entering a restitution order which was not causally connected to the acts Mr. McKnight was convicted of. (Assignments of Error No. 1 and No. 2)

III. Statement of the Case

Mr. McKnight was charged with Assault in the Second Degree. CP 11. The Information alleged Mr. McKnight inflicted substantial bodily harm to Paul Hipps on October 18, 2004. *Id.* A jury trial was conducted in this matter. RP 4. The State based the charge of Assault in the Second Degree on two fractures found in Mr. Hipps' jaw. RP 4. Mr. McKnight admitted to hitting Mr. Hipps in the jaw one time. RP 3. Dr. Rohlifing, a diagnostic radiologist,

testified at trial. 2RP 2¹. He reviewed the CT scan taken of Mr. Hipps' jaw. 2RP 4. The scan was taken on October 29th, 2004. 2RP 6-7. Dr. Rohlfing found a fracture of Mr. Hipps' jaw in the scans. 2RP 5-6.

In closing argument, the state referred back to Dr. Rohlfing's testimony. 2RP 10. The prosecutor argued in closing that the testimony showed Mr. Hipps' jaw was fractured, and referred to jury instruction number 8. 2RP 10. From there the prosecutor argued to the jury that under instruction number 8 substantial bodily harm is proven with evidence of a fracture. *Id.* The prosecutor referred to the fracture again in her rebuttal closing argument. 2RP 22. The jury convicted Mr. McKnight of a lesser charge of Assault in the Fourth degree. CP 14.

The State requested restitution on behalf of Mr. Hipps in the amount of \$3,276.19. RP 5. Mr. McKnight contested the amount of restitution requested by the State. A hearing was conducted before the Honorable Theodore Spearman on December 10, 2007. The documentation the of medical treatment received by Mr. Hipps was presented to the Court with the Defense Memorandum regarding

¹The transcript of proceedings of May 31, 2007 and June 4, 2007, is referred to as 2RP in this Brief.

restitution filed on December 6, 2007 and the Victim Impact Statement submitted by Mr. Hipps. CP 21; CP 1. The restitution sought by the State included \$1,876.00 to the Silverdale Dental Center to pay for a replacement tooth and a full set of dentures. CP 1-10. Additionally, a bill in the amount of \$173.00 for the Oral Surgery & Implant Clinic was included in the victim impact statement. *Id.* Finally, a document titled Olympic Radiology Budget Plan was submitted showing an estimated cost of \$1,077.00. CP 8. Olympic Radiology performed a CT scan of Mr. Hipps' jaw on October 29, 2004. 2RP 6-7

The medical records reveal Dr. Rohlfing detected a fracture of Mr. Hipps' jaw in his review of the CT scan. CP 30. Dr. Haws concluded Mr. Hipps needed new lower dentures, replacement of a tooth in the upper denture, and a realignment of the lower denture due to the fracture. CP 31.

This appeal follows the entry of the order of restitution. CP 38 .

IV. Argument

THE COURT ABUSED ITS DISCRETION BY ENTERING A RESTITUTION ORDER FOR COSTS NOT CAUSALLY RELATED TO THE CRIME MR. MCKNIGHT WAS CONVICTED OF.

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This appeal follows the entry of the order of restitution. CP 38 .

IV. Argument

THE COURT ABUSED ITS DISCRETION BY ENTERING A RESTITUTION ORDER FOR COSTS NOT CAUSALLY RELATED TO THE CRIME MR. MCKNIGHT WAS CONVICTED OF.

Restitution imposed by the trial court is reviewed under an abuse of discretion standard. *State v. Dauenhauer*, 103 Wn.App 373, 377-78, 12 P.3d 661(2000), *review denied*, 143 Wn.2d 1011, 21 P.3d 291, 2001; *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991); *State v. Dennis*, 101 Wn.App. 223, 227, 6 P.3d 1173 (2000). Discretion is abused when it is exercised in a manifestly unreasonable manner or on untenable grounds. *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999); *State v. ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)

1. Restitution must relate to the precise offences charged.

The Superior Court's authority to impose restitution is statutory. *State v. Enstone*, 137 Wn.2d at 682; *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). The authority to impose restitution is not an inherent power of the court, but is derived from statutes. *State v. Davison*, 116 Wn.2d at 919. The trial court lacks authority to impose restitution that is not authorized by statute. *State v. Dauenhauer*, 103 Wn.App. at 378; *State v. Hefa*, 73 Wn.App. 865, 866-67, 871 P.2d 1093 (1994). When a trial judge exceeds his or her statutory authority in entering a restitution order, an abuse of

discretion occurs. *State v. Morse*, 45 Wn.App. 197, 199, 723 P.2d 1209 (1986) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The Court exceeds its statutory authority by ordering restitution for a loss not causally connected with the offence committed by the defendant. *State v. Dauenhauer*, 103 Wn.App. at 379-80. Restitution must be based on damages resulting from the crime charged. *Id.* A defendant may not be required to pay restitution beyond the crime charged without an express agreement to pay restitution for crimes for which the defendant was not convicted. *RCW 9.94A.735(5)*; *State v. Dauenhauer*, 103 Wn. App. at 378. A restitution order is void if statutory provisions are not followed. *State v. Johnson*, 96 Wn.App 813, 815, 981 P.2d 25 (1999) (citing *State v. Duback*, 77 Wn.App. 330, 332, 891 P.2d 40 (1995); *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991))

Mr. McKnight was found guilty of a misdemeanor. The ability to impose restitution for misdemeanor crimes is derived from *RCW 9.92.060(2)* and *RCW 9.95.210(2)*. *State v. Marks*, 95 Wn.App. 537, 539-40, 977 P.2d 606 (1999); *State v. Soderholm*, 68 Wn.App. 363,

between the crime and the injuries for which restitution is ordered.

State v. Martinez, 78 Wn.App. 870, 881, 899 P.2d 1302 (1995);

State v. Awawdeh, 72 Wn.App. 373, 378, 864 P.2d 965 (1994).

“Restitution cannot be imposed based on a defendant’s ‘general scheme’ or actions ‘connected with’ the crime charged, when those acts are not part of the charge.” *State v. Dauenhauer*, 103 Wn. App. at 378, (quoting *State v. Woods*, 90 Wn.App. 904, 907-08, 953 P.2d 834 (1998); *State v. Misak*, 69 Wn.App. at 428.

Restitution must not be based on acts connected with the crime charged when those acts are not part of the charge. *State v. Tindal*, 50 Wn.App. at 403. “A restitution award must be based on a causal relationship between the offense charged and proved and the victim’s losses or damages.” *State v. Keigan C.*, 120 Wn 604, 607-08, 86 P.3d 798 (2004) aff’d *State v. Hiatt*, 154 Wn.2d 560, 115 P.3d 274 (2005). Furthermore, “A defendant may not be required to pay restitution beyond the crime charged or for other uncharged offense absent a guilty plea without an express agreement as part of the process to pay restitution for crimes which the defendant is not convicted.” *State v. Dauenhauer*, 103 Wn.App. 373, 378, 12

P.3d 661 (2000), *review denied*, 143 Wn.2d 1011 (2001);

RCW 9.92.060(2)(b); RCW 9.95.210(2)(b)

Absent agreement otherwise, a defendant may not be ordered to pay restitution for conduct he/she has not been convicted of. Restitution may not be imposed based on a defendant's acts simply connected with the crime charged. *State v. Mark*, 36 Wn.App 428, 430-33, 675 P.2d 1250 (1984) For example, in the case of *State v. Berman*, 50 Wn.App. 125, 131-32, 747 P.2d 492 (1987), *rev. denied*, 110 Wn.2d 1019 (1988), the Court determined that restitution could not be ordered for uncharged thefts the State alleged were part of the same scheme.

In the case of *State v. Dauenhauer, supra*, the Court found that restitution was not properly ordered for costs relating to acts beyond the charged offense. In that case the defendant burglarized three storage units. When the police arrived, the defendant sped through two fences, ran a stop sign, and collided with a truck. The trial court awarded restitution for damage to the fence struck by the defendant and to the vehicle struck by the defendant, over the defendant's objection. The Court of Appeals determined that the restitution award for the fence and the vehicle was beyond the trial

court's statutory authority. Specifically, the Court of Appeals determined that the trial court had no statutory authority to impose restitution for the defendant's general scheme or acts merely connected with the burglaries he was convicted of. *Id* at 379-380.

The case of *State v. Miszak, supra*, is also similar to the case at hand. In that case the defendant was charged with second degree theft involving four specific pieces of jewelry. *Id*. The defendant pled guilty to a charge of attempted second degree theft. In the statement of the defendant upon plea of guilty the defendant admitted to taking only one piece of jewelry. A restitution hearing followed. At the hearing, the state requested restitution for thirteen pieces of jewelry the victim claimed had been taken. The trial court ordered restitution for all thirteen pieces. The Court of Appeals reversed the restitution order and determined that restitution was only permissible for the one piece of jewelry the defendant acknowledged taking. *Id* at 430.

In the case of *State v. Tindal, supra*, the defendant plead guilty to one count of first degree theft. The theft was based on a charge he stole \$21,251.00 from a former employer. *State v. Tindal*, 50 Wn.App. at 402. At a restitution hearing, Mr. Tindal admitted to

taking an addition \$5,000.00 and the Court added that to the amount Mr. Tindal admitted to taking at the time of the entry of the guilty plea. The Court of Appeals reversed the restitution order, ruling the restitution order included reimbursement for acts that were not part of the charge. *State v. Tindal*, 50 Wn.App. at 403. The Court held that restitution must be based of the precise offense charged and not on acts connected with the crime charged.

2. The jury acquitted Mr. McKnight of the assault which caused Mr. Hipps' fracture.

In this case Mr. McKnight was charged with assault in the second degree. CP 11. The State alleged that Mr. Hipps' jaw was fractured as a result of Mr. McKnight punching Mr. Hipps one time. 2RP 10, 22. The jury found Mr. McKnight not guilty of the charge of assault in the second degree. The jury did find Mr. McKnight guilty of the charge of assault in the fourth degree. CP 14. Assault in the fourth degree is defined as follows: "A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodian assault, he or she assaults another." *RCW 9A.36.041(1)*

In the case of *State v. Ashley*, 40 Wn.App. 877, 878, 700 P.2d 1207 (1985), the defendant committed two separate assaults, but was only convicted of one of the assaults. The Court held that the trial court could require the defendant to make restitution only for the injuries caused by the offense charged.

In this case, Mr. McKnight may only be held liable for an injury caused by the fourth degree assault. See *State v. Ashley*, 40 Wn.App. At 879; *State v. Hartwell*, 38 Wn.App. at 140-41. Consequently, restitution for costs other than related to the fracture is all that is permissible. The fracture was not causally related to the assault in the fourth degree Mr. McKnight was found to have committed.

The proper focus for the determination of restitution is whether the crimes distinct from those charged caused the actual damage. *State v. Ashley*, 40 Wn.App. 877, 878-79, 700 P.2d 1208 (1985). Restitution must not be imposed based on acts connected with the crime charged when those acts are not part of the charge. *State v. Woods*, 90 Wn.App. at 907-08; *State v. Hartwell*, 38 Wn.App. At 378. In this case, the trial court exceeded its statutory authority by requiring Mr. McKnight to reimburse Mr. Hipps for

damages related to the fracture. The jury found Mr. McKnight not guilty of assault in the second degree, and therefore not guilty of causing the fracture to Mr. Hipps. The jury explicitly rejected the State's theory that Mr. McKnight caused Mr. Hipps' jaw fracture. In this case there was insufficient causal connection between Mr. McKnight's "intentional unlawful touching" of Mr. Hipps and Mr. Hipps' medical care expenses. No evidence linked Mr. McKnight's crime of assault in the fourth degree with Mr. Hipps' jaw fracture. Additionally, no evidence supports a "but for" causation between Mr. McKnight's crime of assault in the fourth degree and Mr. Hipps' damages. Consequently, the trial court exceeded its statutory authority as it was improper for the trial court to impose restitution for costs related to that fracture.

In response, the State may point to the case of *State v. Thomas*, 138 Wn.App. 78, 155 P.3d 998 (2007). However, the *Thomas* case is distinguishable from the case at hand. In the *Thomas* case the defendant was involved in a motor vehicle accident as the driver of the vehicle. *State v. Thomas*, 138 Wn.App. at 80. The passenger in the vehicle was injured in the accident. *Id.* The defendant was charged with one count of vehicular assault. *Id.*

The State alleged that the defendant either drove under the influence or drove with disregard for the safety of others. *Id.* The jury found the defendant guilty of the crime of driving under the influence but did not fill in the vehicular assault verdict form. *State v. Thomas*, 138 Wn.2d at 80-81. The trial court specifically found the accident was caused by the defendant's driving while under the influence of alcohol. *Id.*

In this case, the State argued Mr. McKnight committed the crime of assault in the second degree by fracturing Mr. Hipps' jaw. 2RP 10. That was the only theory presented by the State at the time of trial. Unlike the *Thomas* case, here the jury explicitly rejected the State's theory that Mr. Knight caused a fracture to Mr. Hipps by finding Mr. McKnight not guilty of the charge of assault in the second degree. The State relied on that fracture as a basis for a conviction for assault in the second degree. Unlike the *Thomas* case, the jury in this case did not leave the jury verdict form blank. Rather, the jury explicitly rejected the State's claim that Mr. McKnight fractured Mr. Hipps' jaw. The restitution sought in this case results from the fracture for which the trier of fact determined Mr. McKnight did not commit.

Mr. McKnight may be held liable for an injury caused by the fourth degree assault. See *Ashley*, 40 Wn. App at 879; *Hartwell*, 38 Wn. App. at 140-41. However, the State failed to prove such injury. Dr. Rohlring testified that the injury he detected was a fracture. 2 RP 4-5. No evidence linked the fourth degree assault to any injury, other than perhaps replacement of the tooth in Mr. Hipps' dentures. The order for restitution in this case includes costs that should not have been awarded in light of the jury's verdict.

3. The restitution order should be vacated.

Here, the trial court exceeded its statutory authority by imposing restitution for acts that Mr. McKnight was found not guilty of by the trier of fact. The restitution order must be vacated in this case. Mr. McKnight was found guilty by a jury of assault in the fourth degree. The jury found Mr. McKnight not guilty of assault in the second degree, and therefore not guilty of causing a fracture to Mr. Hipps' jaw. The restitution ordered by the trial court in this case included costs related to the fracture. The trial court exceeded its statutory authority by awarding costs related to the fracture. The only costs unrelated to the fracture may be the cost for the replacement tooth. The court is limited to imposing restitution for

the offense of conviction. Because there was insufficient causal connection between Mr. McKnight's "intentional unlawful touching" of Mr. Hipps, and Mr. Hipps' medical expenses no evidence linked the fracture between the crime of conviction and Mr. Hipps' damages, the award of restitution must be vacated. The State specifically relied on the fracture as a basis for the conviction in both closing argument and the rebuttal closing argument. 2RP 8-22. The assertion made by the State was that Mr. McKnight punched Mr. Hipps one time which resulted in a fracture. *Id.* The state referred to no other act as a possible basis for a conviction. *Id.*

In so far as the restitution order forces Mr. McKnight to pay for damages for which the trial court was not authorized to impose, the order must be vacated. *State v. Dennis*, 101 Wn. App. At 230, *State v. Ashley*, 40 Wn. App. 877, 879, 700 P.2d 1207 (1985). Mr. McKnight was implicitly acquitted of causing the injuries that resulted in the damages for which the State sought restitution. The restitution awarded must be based on a causal relationship between the offense charged and proved and the victim's damages. Since in this case it was not proven that Mr. McKnight caused Mr. Hipps' jaw fracture, Mr. McKnight cannot be held responsible to reimburse

Mr. Hipps for the damages related to his fracture. Specifically, those damages include the CT scan and replacement dentures. The dentures were replaced to accomodate a change in Mr. Hipps' jaw brought about as a result of the fracture. CP 31. This Court should vacate the Restitution order entered in this case. The trial court exceeded its statutory authority in making Mr. McKnight liable for Mr. Hipps' medical expenses.

V. Conclusion

For the reasons cited above, Mr. McKnight respectfully requests this Court to vacate the restitution order requiring him to pay restitution related to the fracture of Mr. Hipps' jaw and any restitution not associated with his conviction for assault in the fourth degree.

Respectfully submitted this 15 day of August, 2008.



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MICHAEL THOMAS McKNIGHT,

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CERTIFICATION OF MAILING

I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant in the above-captioned case hand-delivered or mailed as follows:

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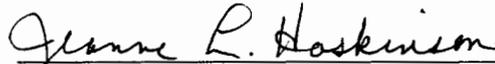
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DATED this 15th day of August, 2008, at Port Orchard, Washington.


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