

NO. 37254-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MCKNIGHT,

Appellant.

FILED
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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00928-2

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED October 16, 2008, Port Orchard, WA *[Signature]*
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

Whether the trial court properly concluded that the expenses related to Paul Hipps's broken jaw and dentures were caused by McKnight's assault on him?

II. STATEMENT OF THE CASE

Michael McKnight was charged in Kitsap County Superior Court with second-degree assault. CP 11. The charges were based on an altercation occurring in McKnight's home. CP 22. McKnight and Paul Hipps, apparently a workman, got into an argument. CP 22. As the argument continued, McKnight struck Hipps once in the face with enough force to knock him to the floor. CP 22. McKnight then told Hipps to get his tools and leave, which Hipps did. CP 22-23. It was observed that at least one tooth came loose from his dentures at that time. CP 23. Eleven days later, Hipps, apparently of limited means, *see* RP (12/10) 17-18, finally sought medical care. CP 23. It was determined at that time that his jaw had been fractured in two places. CP 23.

At trial, McKnight raised the defense of lawful use of force and defense of property. CP 59. The jury acquitted McKnight of second-degree assault. CP 64. It also rejected the defense of property claim, and found McKnight guilty of the lesser offense of fourth-degree assault. CP 27, 58.

The State subsequently sought restitution. RP (12/10) 2. Because of the fractured jaw, Hipps's dentures had to be redone. The total cost for all the medical and dental attention, which McKnight did not dispute, came to \$3276.19. *See* RP (12/10) 5; CP 7-10, 28-35.

McKnight argued that by acquitting him of second-degree assault, the jury necessarily found that the fracture was not caused by his punch, citing the jury instruction that included "fracture" in the definition of substantial bodily harm, which he asserted was the element that distinguished second-degree from fourth-degree assault.

The trial court concluded jury could have found insufficient proof beyond a reasonable doubt that the fracture was caused by the assault. RP (12/10) 16. Nevertheless, the court also concluded that it was subject only to a preponderance standard of proof when imposing restitution, and was therefore not bound by the acquittal. RP (12/10) 16. The court reviewed the evidence of causation and concluded that it established by a preponderance of the evidence that the fracture was caused by the assault. RP (12/10) 17-18. It accordingly entered an order of restitution in the amount requested. CP 36.

III. ARGUMENT

THE TRIAL COURT PROPERLY CONCLUDED THAT THE EXPENSES RELATED TO MR. HIPPS'S BROKEN JAW AND DENTURES WERE CAUSED BY MCKNIGHT'S ASSAULT.

McKnight argues that the trial court erred in ordering restitution for Paul Hipps's broken jaw upon McKnight's conviction of fourth degree assault. He claims that the jury's acquittal on the charge of second-degree assault means that it found that the fractures were not attributable to McKnight's punch, and the trial court was thus precluded from awarding restitution for it. This claim is without merit because the jury's verdict did not necessarily depend on a lack of causality. Moreover, even if it did, because restitution must only be proven by a preponderance of the evidence such a verdict would not preclude an award.

A trial court's order of restitution will not be disturbed on appeal absent abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, ¶ 12, 166 P.3d 1167 (2007). Application of an incorrect legal analysis or other error of law can constitute abuse of discretion. The only question presented in this case is one of law: whether a trial court may find by a preponderance of the evidence for purposes of restitution facts that the jury may not have found beyond a reasonable doubt?

McKnight argues, based primarily on *State v. Taylor*, 86 Wn. App. 442, 936 P.2d 1218 (1997), that because the jury acquitted him of second-degree assault it necessarily found that the assault did not cause the fractures to Hipps's jaw. This argument is untenable under this Division's reading of *Taylor* in *State v. Thomas*, 138 Wn. App. 78, 155 P.3d 998 (2007).

In *Thomas*, this court rejected *Taylor* on two separate grounds. *Thomas*, 138 Wn. App. at ¶ 14. First, it distinguished the case as a factual matter, based on the nature of the jury's acquittal. *Id.* Secondly, it called into doubt *Taylor's* legal underpinning, which failed to take into account the differing standards of proof for conviction and for restitution. *Id.*

In *Taylor*, the State accused the defendant of committing first degree welfare fraud. By rejecting the original charge, the *jury necessarily found* the State did not prove Taylor fraudulently received more than \$1500 in benefits. Instead, by finding him guilty of second-degree welfare fraud, the *Taylor* jury explicitly found that Taylor fraudulently received benefits totaling between \$250 and \$1,500, and that he thus properly received some of the benefits collected. *Thomas*, 138 Wn. App. at ¶ 16 (*citing Taylor*, 86 Wn. App. at 445-46). The *Taylor* trial court could only award restitution for the crime Taylor actually committed: fraudulently receiving less than \$1,500 in benefits and Division I correctly held restitution in that case and on those facts must be less than \$1500. *Thomas*, 138 Wn. App. at ¶ 17 (*citing Taylor*, 86 Wn. App.

at 445-46).

Here, however, by acquitting McKnight of second-degree assault, it did not *necessarily* find that the fractures were not caused by the blow. It cannot be contested that a fracture is “substantial bodily harm”; and the jury was specifically instructed to that effect. CP 52.

But the infliction of “substantial bodily harm” is not the only element distinguishing second- and fourth-degree assault as charged in this case. The substantial bodily harm must be “recklessly inflicted.” CP 50. The jury below was given the following definition of “reckless”:

A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

CP 54.

Given the facts in this case, a single punch delivered to a claimed trespasser during an argument in the defendant’s own home, it far more probable that the jury found that McKnight’s conduct was not reckless than that the fracture was not caused by the punch. In any event, this Court is not constrained to resolve that question. It is sufficient to say under *Taylor* that the jury did not *necessarily* find that the Hipps’s injury was not caused by McKnight’s assault. That being the case, under *Thomas*, the trial court was

free to find that the injury was caused by the assault.

Further, to the extent that *Taylor* can be read to hold that a trial court may never impose restitution based on elements not found by the jury, it fails to consider the burden of proof. There is no right to a jury trial to determine facts on which restitution is based. *State v. Kinneman*, 155 Wn.2d 272, ¶ 19, 119 P.3d 350 (2005). Thus, in *Thomas*, the jury found Thomas committed the crime of DUI. Although Thomas's jury failed to find beyond a reasonable doubt that her DUI caused the victim's injuries, that failure did not preclude the sentencing court from awarding restitution based on a preponderance finding that the injuries were caused by the DUI. *Thomas*, 138 Wn. App. at ¶ 18.

Likewise, here, assuming that the jury's verdict meant that the State failed to prove beyond a reasonable doubt that McKnight's punch broke Hipps's jaw, the trial court was satisfied by a preponderance of the evidence that it did. Its restitution award was thus proper.

McKnight's reliance on *State v. Ashley*, 40 Wn. App. 877, 700 P.2d 1207 (1985), is misplaced. In that case there were two distinct assaults, and the Court held that conviction of one of them did not support an award of restitution for damages flowing from the other. Here, on the other hand there was only one assault, indeed only one punch. The only question is whether

that punch fractured Hipps's jaw. The trial court found that the evidence preponderated in the State's favor. *Ashley* does not apply.

To the extent that McKnight challenges the evidentiary support for the finding, *see* Brief of Appellant at 12, the record does not support his contention. McKnight himself conceded at the restitution hearing that Hipps testified that the fracture was the result of the punch. RP (12/10) 12. He clearly conceded hitting Hipps. RP (12/10) 13. The trial court, which had "a keen memory" of the trial, noted that the only "evidence" that the defense suggested interrupted this chain of causation was the 11-day delay between the assault and Hipps seeking medical assistance. RP (12/10) 16-17. The court noted however, that that physician, Dr. Haws, attributed the injury to the assault. RP (12/10) 17. It also noted, with no offense intended, that Hipps was barely above the level of a "street person," which no doubt attributed to the delay. RP (12/10) 18. The court was thus satisfied with Hipps's testimony that the injury was a result of the punch. RP (12/10) 18. The court in particular noted that there was no contradictory evidence, and that such injuries could be caused by a blow of the kind McKnight admitted to delivering. RP (12/10) 18. As such the evidence¹ clearly supported the trial court's conclusions as to the preponderance of the evidence.

¹ The trial court relied in part on its recollection of the trial testimony, which McKnight has chosen not to have transcribed.

Finally, even if the Court determines that the trial court was without power to award restitution based on the fractures to Hipps's jaw, McKnight conceded below that a portion of Hipps's expenses were attributable to expenses that were not the result of the fractured jaw, although the precise amounts were in dispute. RP (12/10) 14. It is appropriate to remand for further fact finding on reversal of an award. *Kinneman*, 155 Wn.2d at ¶ 37. If the present order is reversed, the cause should therefore be remanded to determine what restitution McKnight should owe based on damages other than those caused solely by the fractures to his jaw.

IV. CONCLUSION

For the foregoing reasons, the trial court's order of restitution should be affirmed, or failing that, the cause should be remanded for a new restitution hearing.

DATED October 16, 2008.

Respectfully submitted,

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