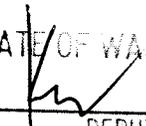


FILED
COURT OF APPEALS
DIVISION II

10 SEP 20 AM 9:09

STATE OF WASHINGTON

BY  DEPUTY

No. 40130-4-II
COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VIRGIL VELKOV,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Amber L. Finlay, Trial Court Judge
Cause No. 09-1-00202-9

BRIEF OF RESPONDENT

TIMOTHY W. WHITEHEAD
Deputy Prosecuting Attorney for
Gary P. Burleson, Prosecuting Attorney

Mason County Prosecutor's Office
521 N. Fourth Street
P.O. Box 639
Shelton, WA 98584
Tel: (360) 427-9670 Ext. 417
Fax: (360) 427-7754

9-1-10

TABLE OF CONTENTS

A. Appellant’s Assignment of Error.....1

B. Issue Pertaining to Assignment of Error.....1

C. Evidence Relied Upon.....1

D. Statement of the Case.....2

E. Argument.....3-9

 1. The restitution order should not be vacated when the amount of
 restitution was determined within 180 days of sentencing.....3

 2. The trial court did not err in permitting Velkov to be represented
 by counsel who did not object to entry of timely restitution
 order.....6

 3. The trial court did not err in finding that Velkov was the
 proximate cause of the injuries sustained by Abrams.....7

F. Conclusion.....10

TABLE OF AUTHORITIES

1. Table of Cases

State v. Davison, 116 Wash.2d 917, 809 P.2d 1374 (1991).....5

State v. Shannahan, 69 Wash.App. 572, 849 P.2d 1239 (1993).....6

State v. Walker, 143 Wash.App. 880, 181 P.3d 31 (2008).....6

State v. Studd, 137 Wash.2d 533, 973 P.2d 1049 (1999).....6

State v. McFarland, 127 Wash.2d 322, 899 P.2d 1251 (1995).....6,7

State v. Rodriquez, 121 Wash.App. 180, 87 P.3d 1201 (2004).....6,7

State v. White, 81 Wn.2d 223, 500 P.2d 1242 (1972).....7

State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969).....7

State v. Hahn, 100 Wash.App. 391, 996 P.2d 1125 (2000).....7

State v. Kinneman, 122 Wash.App. 850, 95 P.3d 1277 (2004).....7

State v. Thomas, 138 Wash.App 78, 155 P.3d 998 (2007).....8,9

State v. Tobin, 161 Wn.2d 517, 166 P.3d 1167 (2007).....9

State v. Wade, 138 Wn.2d 460, 979 P.2d 850 (1999).....9

2. Other Jurisdiction

Strickland v. Washington, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674
(1984).....6

3. Statutory Authority

RCW 9.94A.753.....3,4,5
RCW 9.92.060.....7
RCW 9.95.210.....7

4. Other

RAP 10.3.....2

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the restitution orders more than 180 days after Velkov was sentenced.
2. The trial court erred in permitting Velkov to be represented by counsel who provided ineffective assistance by failing to argue that the restitution orders were untimely.
3. The trial court erred in imposing restitution for the victim's expenses relating to the victim's fractured jaw where there was insufficient proof of a causal connection between the crime for which Velkov was convicted, assault in the fourth degree, and the injuries sustained by Abrams for which the court ordered restitution.
4. In ordering restitution, the trial court erred in entering findings of fact 4, as fully set forth on page 3 in Appellants brief.
5. In ordering restitution, the trial court erred in entering conclusions of law 1 and 2, as fully set forth in Appellants brief on pages 3-4.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the restitution order should be vacated when the amount of restitution was determined within 180 days of sentencing.
2. Whether the trial court erred in permitting Velkov to be represented by counsel who did not object to entry of timely restitution orders.
3. Whether the trial court erred in finding that Velkov was the proximate cause of the injuries sustained by Abrams.

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP."

The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Velkov's recitation of the procedural history except for the following distinctions and additional facts:

The trial court, on March 24, 2010, entered an Order of Restitution that did not specify the amount of restitution, however, it did state that Velkov was jointly and severally liable for restitution with co-defendant Talon Newman. CP 88. The court entered a restitution order in co-defendant Talon Newman's case on February 22, 2010 in the amount of \$13,771.74 to be dispersed as follows: \$3,693.22 to Ashley Abrahms; \$10,078.52 to Premera Blue Cross Claim #814368420200. The order states that restitution shall be paid jointly and severally with Virgil Velkov No. 09-1-00202-9.¹

Detective Pittman testified, that while interviewing Velkov, he noticed a "little nick" in between his fingers. Velkov told the detective punching Mr. Abrams caused the injury. RP 63. Detective Pittman testified that the injury to Velkov's knuckle was consistent with catching someone's tooth. RP 69.

¹ Copy of restitution document attached as appendix A for court's convenience.

E. ARGUMENT

The authority to order restitution is derived solely from statute.

State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082. This examination starts with an analysis of the relevant statute. RCW 9.94A.753 (1) states:

When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within on hundred eighty days.

On February 22, 2010, in the case of Talon Newman (09-1-00196-1), Mason County Superior Court entered a restitution order. In that order the court ordered that Newman's co-defendant, Virgil Velkov, was jointly and severally responsible for the restitution amount of \$13, 771.74. This was done within the 180 days of Velkov's sentence.

On March 24, 2010 the court entered a restitution order in Velkov's case. This was done within 180 days from Velkov's sentencing. That order read that Velkov shall be jointly and severally responsible with co-defendant, Talon Newman, for restitution. CP 88. This restitution order did not specifically set out the amount of restitution owed. However, the amount had been determined because it had been established in Newman's case and each restitution order referenced the other codefendant as being jointly and severally liable. Further, the Findings of

Fact and Conclusions of Law also states that Velkov is jointly and severally liable with the co-defendant for restitution in this matter. CP 87

The restitution order entered on March 24, 2010 in Velkov's case was entered within 180 days of sentencing. This satisfies the statutory requirement because the amount of restitution had previously been determined in Newman's case and Velkov's order specifically references joint and several liability with co-defendant Newman. The essence of joint and several liability is that the co-defendants share the responsibility of restitution.

An exception to the 180-day rule lies in RCW 9.94A.753(7). That section of that statute states that if no restitution order has been entered and the victim is entitled to benefits through crime victim's compensation act, the Department of Labor and Industries has one year from sentencing to petition for entry of a restitution order.

On June 4, 2010, The Department of Labor and Industries, pursuant to this statute, filed a restitution request for \$201.87. This amount was included in the amended restitution order entered on July 13, 2010. CP 106. This was done within one year of Velkov's sentence and is therefore valid and should be included in the restitution amount.

Restitution orders may be modified as to their terms and amounts. RCW 9.94A.753 (4) states:

The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime.

The amount of restitution owed was amended on July 13, 2010. This is allowed and contemplated by the statute. Mr. Velkov was still under the court's jurisdiction, and therefore, the court may modify the terms and amounts of the restitution order.

The language of this state's restitution statutes indicates a legislative intent to grant broad powers of restitution. *State v. Davison*, 116 Wash.2d 917, 920, 809 P.2d 1374 (1991). Statutes must be interpreted broadly to allow restitution, thus carrying out the intent of the Legislature. *Id.* The restitution statute is clear; the amount of restitution shall be determined at the sentencing hearing or within 180 days. RCW 9.94A.753(1). The amount of restitution in this case was determined within 180 days of sentencing in this case. The restitution amount was determined in Mr. Newman's case on February 22, 2010 jointly and severally liable with Mr. Velkov. Subsequently, on March 24, 2010, within 180 days of sentence, a restitution order was entered in Velkov's case. CP 88. This order also stated that Velkov was jointly and severally liable with Newman.

The legislature has made it clear that victim's of crimes are to be protected. RCW 7.69.010 states "victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants." Indeed, "restitution is an integral part of the Washington system of criminal justice," and various restitution statutes indicate a strong public policy to provide restitution whenever possible." *State v. Shannahan*, 69 Wash.App. 512, 517, 518, 849 P.2d 1239 (1993).

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the deficient performance resulted in prejudice. *State v. Walker*, 143 Wash.App. 880, 890, 181 P.3d 31 (2008); see *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

We start with the strong presumption that counsel's representation was effective. *State v. Studd*, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999). This requires the defendant to demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995).

Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. *State v.*

Rodriguez, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004). Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wash.2d 322, 334-335, 899 P.2d 1251 (1995). Effective assistance of counsel does not mean successful assistance of counsel. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. *State v. Gilmore*, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

In the present case counsel's performance was not deficient. The amount of restitution was determined within the specified time period. Entry of the restitution order resulted in no prejudice to the defendant.

Under the applicable statutes, the court can order a defendant convicted of a crime to pay restitution whenever "the crime in question" caused a loss to another. RCW 9.92.060(2) and 9.95.210(2). To prove a defendant's crime caused the victim's loss, the State must establish the loss would not have occurred but for the crime. *State v. Hahn*, 100 Wash.App. 391, 399, 996 P.2d 1125 (2000). The State need only prove causation by a preponderance of the evidence. *State v. Kinneman*, 122 Wash.App. 850, 860, 95 P.3d 1277 (2004).

If a jury failed to find beyond a reasonable doubt that a crime committed by a defendant caused a victim injuries, that failure does not

preclude the sentencing court from awarding restitution based on a preponderance finding that it did. *State v. Thomas*, 138 Wash.App. 78, 155 P.3d 998 (2007).

In *Thomas*, the defendant was charged with vehicular assault after she drove a car involved in an accident that injured her passenger. The state alleged that the defendant caused the injuries to the passenger either by driving under the influence of alcohol or by driving with disregard for the safety of others. To convict the defendant of vehicular assault, the jury had to find beyond a reasonable doubt that either she drove under the influence or she drove with disregard for the safety of others and that one of these actions was a proximate cause of the injury. The jury did not find the defendant guilty of vehicular assault, but found her guilty of the lesser-included crime of DUI. At the restitution hearing the court ordered the defendant to pay restitution for medical expenses incurred to treat the victim. The court found that “one of the causations of the accident was the defendant being under the influence of alcohol. *State v. Thomas*, 138 Wash.App. 78, 155 P.3d 998 (2007).

The trial courts restitution order was upheld. The court stated that the defendant’s jury failed to find beyond a reasonable doubt that her DUI caused the victim’s injuries. That failure does not preclude the sentencing

court from awarding restitution based on a preponderance finding that it did. *Id.* At 85.

In the present case, like in *Thomas*, the jury did not convict Velkov of assault in the second degree. However, they did convict Velkov of the lesser-included crime of assault in the fourth degree. Velkov filed a memorandum in opposition to restitution that the court considered. CP 79. The court entered findings of fact and conclusions of law stating that Velkov's actions, conduct and participation in the assault were the proximate cause of the victim's injuries from the assault. CP 87.

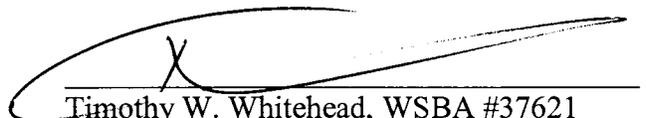
A trial court's order of restitution will not be overturned on appeal absent an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). "A court abuses its discretion when its discretion is manifestly unreasonable or based on untenable grounds." *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). Upon Velkov's own admission he punched Mr. Abrams in the face a couple of times. Unfortunately, a number of others also assaulted Mr. Abrams. The trial court did not abuse its discretion finding that Velkov was the proximate cause of the injuries sustained by Abrams.

F. CONCLUSION

The State respectfully requests the Court to affirm the restitution order.

Dated this 17 day of September 2010.

Respectfully submitted by:



Timothy W. Whitehead, WSBA #37621
Deputy Prosecuting Attorney for Respondent
Mason County, WA

No. 40130-4-II

Court of Appeals, Division II

State of Washington

Appended Documents
As requested by the Court of Appeals

Mason County 09-1-00202-9, Restitution Order-App. A

Timothy W. Whitehead
Attorney for Respondent
WSBA # 37621

Mason County Prosecutor's Office
521 N. Fourth Street
P.O. Box 639
Shelton, WA 98584
(360) 427-9670 ext. 417
(360) 427-7754 fax

Doc.

RECEIVED & FILED
FEB 22 2010
PAT SWARTOS, Clerk of the
Superior Court of Mason Co. Wash

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR MASON COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 TALON NEWMAN,)
)
 Defendant.)

NO. 09-1-00196-1

ORDER OF RESTITUTION

09-9-1149-3

This matter having come before the Court for a restitution hearing, the court having found that the amount of restitution set forth below should be paid by the defendant, and that the persons named below are entitled to the amount of restitution stated, now, therefore, it is hereby

ORDERED that the defendant shall pay restitution to the clerk of the court in the amount of \$ 13,771.74, to be dispersed as follows:

<u>Name</u>	<u>Address</u>	<u>Amount</u>
BRANDON HARRISON	1346 COLCHESTER DR SE PORT ORCHARD, WA 98366	<u>NONE REQUESTED</u>
ASHLEY ABRAMS	12716 BANNER ROAD OLALLA, WA 98359	<u>\$3,693.22</u>
PREMERA BLUE CROSS CLAIM #814368420200	P.O BOX 33932 SEATTLE, WA 98133	<u>\$10,078.52</u>
CRIME VICTIMS		<u>ZERO PAID</u>

68

[XXX] IT IS FURTHER ORDERED that the restitution ordered above shall be paid jointly and severally with:

VERGEL VELKOV

NO. 09-1-00202-9

DONE IN OPEN COURT THIS 22 DAY OF Feb, 2010.

Tonia Sheldon

Judge

Presented by:

Approved for Entry

Rebecca Jones
REBECCA L. JONES, #27730
Deputy Prosecuting Attorney

James Foley
JAMES FOLEY, #20402
Attorney for Defendant

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 VIRGIL VELKOV,)
)
 Appellant,)
 _____)

No. 40130-4-II

DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
10 SEP 20 AM 9:09
STATE OF WASHINGTON
BY _____ DEPUTY

I, MARGIE OLINGER, declare and state as follows:

On FRIDAY, SEPTEMBER 17, 2010, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Thomas Doyle
P.O. Box 510
Hansville, WA 98340-0510

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

Dated this 17TH day of September, 2010, at Shelton, Washington.



MARGIE OLINGER