

NO. 47422-1-II; 47869-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CARLOS AVALOS  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Christopher Melley, Judge

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SUPPLEMENTAL BRIEF OF APPELLANT

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LISE ELLNER  
Attorney for Appellant

LAW OFFICES OF LISE ELLNER  
Post Office Box 2711  
Vashon, WA 98070  
(206) 930-1090  
WSB #20955

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STATUTES, RULES AND OTHERS

RCW 9.94A.735.....*ad passim*

A. ASSIGNMENTS OF ERROR

1. The trial court, without statutory authority, erred in ordering over \$16,000 in restitution for fictitious travel charges to and from the victim's home and work during the period of time that the victim did not travel to work.

Issues

2. Did the trial court, without statutory authority, err in ordering over \$16,000 in restitution for theoretical travel charges to and from the victim's home and work during the period of time that the victim did not travel to work?

B. STATEMENT OF THE CASE

Carlos Avalos was 19 years old when he was charged with assault in the first degree with a deadly weapon enhancement against a corrections officer in Clallam Bay Corrections Center. CP 439. Avalos was convicted of the lesser offense of assault in the second degree without the weapons enhancement. CP 107, 354-59.

During the restitution hearing, the state successfully argued over the objection of trial counsel, that Mr. Huether, the assaulted corrections officer was entitled to \$16,623.48 dollars in transportation costs to and from his home and work for the period when Heuther was on paid leave and not traveling to work. RP 4, 6, 26. The trial court permitted the non-existent traveling expenses and explained:

The question is, should he receive any kind of a set off of \$16,600.00, ballpark, that he didn't have to pay, \$16,623.48 that he didn't have to pay for fuel going to and from work?

It's an intriguing argument, but I'm not going to accept it. I'm going to order the payment of \$3,391.54, to Mr. Huether. That includes the holidays, the 11 holidays of 2985.68. So, in total, Mr. Avalos is gonna be responsible for, to L & I, \$45,984.81, to Mr. Huether, \$3,391.54.

RP 26. The court ordered \$45,994.81 in restitution to L & I including the \$16,0000 in un-incurred travel expenses and \$3,391.54 to Mr. Huether for a total of \$49,376.35. CP 450. Carlos Avalos was twenty years old at the time of sentencing. RP 7 (March 10, 2015). This timely appeal follows. CP 14.

C. ARGUMENTS

THE TRIAL COURT ERRED IN ORDERING  
RESTITUTION FOR FICTICIOUS TRAVEL  
EXPENSES.

The trial court's authority to order restitution is derived entirely from statute. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008); *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Courts have broad discretion when determining the amount of restitution. *State v. Kinneman*, 155 Wn.2d 272, 282, 119 P.3d 350 (2005). The trial court abuses its discretion where the restitution order is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *State v. Enstone*, 137 Wn.2d 675, 769-80, 974 P.2d 828 (1999). The court's application of an incorrect legal analysis or other error of law can constitute an abuse of discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). Here, the trial misunderstood and misapplied RCW

9.94A.735(3), accordingly, the standard of review is de novo. *Sound Infiniti Inc., v. Snyder*, 169 Wn.2d 199, 206, 237 P.3d 241 (2010).

b. Restitution Must be Based on Easily Ascertainable Loss.

A statute must be construed according to its plain language. *Seashore*, 163 Wn. App. at 538-39. If the statute's language is unambiguous, the analysis ends. *Id.* An interpretation that leads to absurd results must be rejected, because it "would belie legislative intent." *Troxell v. Rainier Public School Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). A statute shall be construed so as to give meaning to each provision. *Berrocal v. Fernandez*, 155 Wn.2d 585, 599-600, 121 P.3d 82 (2005).

Under RCW 9.94A.735(3), a court may order restitution as part of a criminal sentence. RCW 9.94A.753(3) provides:

3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

*Id.*

A restitution award must be based on "substantial credible evidence," which is "sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or

conjecture.” *Griffith*, 164 Wn.2d at 965. If the accused disputes the amount of restitution, the state must prove the amount of loss or expense by a preponderance of the evidence. *Id.*

The court can order restitution for loss or expense that was incurred by a party other than the victim, so long as the loss is causally connected to the offense. *Tobin*, 161 Wn.2d at 524; *see e.g. State v. Davison*, 116 Wn.2d 917, 809 P.2d 1374 (1991) (upholding a restitution award compensating a city for wages paid to an assault victim during his recovery). The total amount of restitution, however, “shall not exceed double the amount of the offender’s gain or the victim’s loss from the commission of the crime.” RCW 9.94A.753(3).

Under the plain language of the statute, the doubling provision imposes a limit on what the sentencing court can order. It does not authorize the court to arbitrarily double the restitution amount and thereby grant the alleged victim a windfall. Interpreting the doubling provision as creating authority to double an award (rather than imposing an upper limit on the aggregate of all restitution) would lead to absurd results and render other portions of the statute superfluous. Such an interpretation would contravene the plain language of the statute and violate basic precepts of statutory interpretation. *Seashore*, 163 Wn. App. at 538-39; *Troxell* 154 Wn.2d at 350; *Berrocal*, 155 Wn.2d at 599-600.

Accordingly, the trial court cannot impose restitution for theoretical expenses that were never incurred because these are neither losses nor

ascertainable and simply permit a windfall. RCW 9.94A.735(3). Instead, the doubling provision must be read to allow the court to compensate parties other than the victim, so long as the total award does not exceed double the victim's loss (or the offender's gain). *See Tobin*, 161 Wn.2d at 524; *Davison*, 116 Wn.2d 917.

For example, permitting a court to double a restitution award without providing any reason for doing so would vitiate the requirement that restitution be based on "easily ascertainable damages," in violation of the rule of statutory interpretation that each provision be given meaning. *Berrocal*, 155 Wn.2d at 599-600; RCW 9.94A.753(3). Such an interpretation also contradicts the requirement that the state prove the amount of restitution by a preponderance of the evidence based on substantial, credible evidence. *Griffith*, 164 Wn.2d at 965. For this reason, when the court orders restitution for expenses beyond the victim's actual loss, it should enter findings as to the amount of loss to the victim. *State v. Slemmer*, 48 Wn. App. 48, 60, 738 P.2d 281 (1987) *overruled on other grounds by State v. Frohs*, 83 Wn. App. 803, 924 P.2d 384 (1996).

Here, the trial court acknowledged that the victim did not suffer a loss of travel expenses, but without explanation decided to impose the theoretical mileage expenses without any findings. The trial court did not indicate that it was using the doubling provision, the court simply stated:

The question is, should he receive any kind of a set off of \$16,600.00, ballpark, that he didn't have to pay, \$16,623.48 that he didn't have to pay for fuel going to and from work? It's an intriguing argument, but I'm not going to accept it. I'm going to order the payment of \$3,391.54, to Mr.

Huether. That includes the holidays, the 11 holidays of 2985.68. So, in total, Mr. Avalos is gonna be responsible for, to L & I, \$45,984.81, to Mr. Huether, \$3,391.54.

RP 26. Contrary to RCW 9.94A.735(3), the court ordered \$16,000 of additional restitution, which was not based on “easily ascertainable damages” of a loss or gain to any party and was not a doubling of any identifiable loss or gain. RCW 9.94A.753(3).

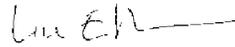
The plain language of the restitution statute sets a maximum amount beyond which restitution cannot be ordered. RCW 9.94A.753(3). The trial court’s interpretation of this provision as a grant of authority to arbitrarily increase the amount of restitution is contrary to that plain language. *Seashore*, 163 Wn. App. at 538-39. No statute endows the court with authority to impose additional restitution beyond what has been proven based on easily ascertainable damages. RCW 9.94A.753(3). The imposition of \$16,000 in mileage was both an error at law and an abuse of discretion because the amount was neither based on the victim’s loss or the defendant’s gain and was merely a whim of the court to arbitrarily provide a windfall to a third party provider.

Contrary to RCW 9.94A.735(5), the trial court erred by imposing \$16,000 in un-incurred mileage not associated with the victim’s loss or the defendant’s gain. For these reasons, Mr. Avalos sentence must be remanded for a new restitution order eliminating the \$16,000 in non-existent mileage costs.

D. CONCLUSION

DATED this 14th day of December 2015.

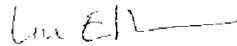
Respectfully submitted,



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LISE ELLNER  
WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the AAG Office Joshua Choate and John Hillman and [joshuacl@atg.wa.gov](mailto:joshuacl@atg.wa.gov) [johnh5@atg.wa.gov](mailto:johnh5@atg.wa.gov) and Carlos Avalos DOC# 359594 IMU North H6 Washington State Penitentiary 1313 N 13th Ave Walla Walla, WA 99362 true copy of the document to which this certificate is affixed, on December 14, 2015. Service was made electronically to the state and via U.S. Mail to Mr. Avalos.



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Signature

**ELLNER LAW OFFICE**

**December 14, 2015 - 3:07 PM**

**Transmittal Letter**

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[johnh5@atg.wa.gov](mailto:johnh5@atg.wa.gov)

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