

62891-7

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NO. 62891-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ASHLEY ALEXANDER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Was there a causal connection between the facts underlying the crime (disorderly conduct) and the injuries suffered by SPD Ofc. Whalen?
2. Did the State sufficiently establish, by a preponderance of the evidence, a causal connection between amount of restitution and Ofc. Whalen's injuries?
3. Did the award of restitution violate the defendant's right to due process?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

Ashley Alexander pled guilty to one count of disorderly conduct, a misdemeanor. CP 7-11; 1RP 4-10.¹ This was a reduced charge from assault in the third degree, a felony. CP 1. Alexander was sentenced to three days in jail. CP 19. After a restitution hearing, the trial court imposed restitution in the amount of \$6,535.22 for injuries and time loss suffered by SPD Officer Whalen. Alexander has filed an (untimely) notice of appeal. CP 44-45.

¹ The State adopts the method used by Alexander to refer to the verbatim report of proceedings: 1RP (April 25, 2008); 2RP (June 13, 2008), and 3RP (November 24, 2008).

B. FACTUAL BACKGROUND.

Alexander agreed as part of the plea agreement in this case that the real and material facts of the underlying incident were set forth in the certification for determination of probable cause. CP 17. The following summary of the events leading to Alexander's arrest is taken from that document.

On November 6, 2007, Seattle Police Department ("SPD") Officer Whalen was working in full uniform in a marked patrol vehicle. At 8:52 a.m., SPD dispatch advised Ofc. Whalen that a male and female were in a physical fight at 21st Avenue and East Alder. One minute later, dispatch advised that the vehicle was dragging the man involved in the incident. When Ofc. Whalen arrived in the vicinity, a witness pointed out to her the vehicle that was involved in the incident. Ofc. Davidson advised Ofc. Whalen of the vehicle's license plate number. CP 2.

At 9:05 a.m., Ofc. Whalen again observed the vehicle and followed it, waiting for a back-up unit to arrive before activating her emergency lights. When Ofc. Zech arrived, Ofc. Whalen activated her emergency lights and stopped the vehicle. Neither Ofc. Whalen nor Ofc. Zech knew if they were contacting the victim or the suspect in the reported disturbance/assault. CP 2.

Ofc. Whalen approached the vehicle and saw a woman inside, later identified as Ashley Alexander. Alexander was moving around in the vehicle and leaning over the back seat. Ofc. Whalen did not know if there were weapons in the vehicle. Ofc. Whalen asked Alexander to turn her vehicle off. Alexander responded by stating, "Why do you want me to turn my car off?" When Ofc. Whalen again asked Alexander to turn off the ignition, Alexander began to argue with the officer. CP 2-3.

Alexander asked why she needed to get out of the car and Ofc. Whalen told her that she was involved in a disturbance and they needed to talk with her. Alexander was asking, "Do we have to do this right here?" Ofc. Whalen said yes. While this was occurring, Ofc. Zech was telling Alexander over his car audio system to turn her car off and get out of the vehicle. Alexander was saying, "Don't yell at me," over and over. CP 2.

When Alexander stepped from the car, Ofc. Whalen told her to put her hands on the vehicle. Alexander stated, "Why do I have to put my hands on the car?" Both officers could see that Alexander had her car keys balled up in her left hand with the keys sticking out through her fingers. The officers believed that Alexander might be thinking of using the keys in her fist as a

weapon. Alexander was very angry. Ofc. Whalen then ordered Alexander to put her hands on the car. Alexander did not do so. CP 2.

Ofc. Whalen took hold of Alexander's arm. Alexander violently pulled away from Alexander's grasp. Alexander can be heard in the patrol car audio/video yelling, "Don't touch me. Do not touch me. Get your hands off me!" CP 3. As the officers attempted to gain control of Alexander, she can be heard on the patrol car audio/video yelling: "Oh my God! What the fuck are you doing you dumb bitch? Get off me. Get off me. Get off me." Alexander was repeatedly told by Ofc. Zech to stop fighting. Alexander responded by stating, "I'm not going to cooperate with you." CP 3.

As the officers attempted to control Alexander, Alexander was punching and kicking. She was yelling, "Get off me," over and over and hysterically yelling "Oh my God." When she is told to cooperate, Alexander told the officers to get off of her, saying, "You police officers are crazy." CP 3.

Alexander struck Ofc. Whalen in the face with a few glancing blows. Ofc. Zech put his arm around Alexander's head to control her. Alexander kicked Ofc. Whalen in the face. Ofc. Whalen

grabbed Alexander's legs but Alexander continued to kick the officer. Alexander placed one foot on Ofc. Whalen's face and pushed to get her other leg free. She then kicked Ofc. Whalen in the face again. CP 4.

Alexander was taken to the ground where she continued to struggle and kick. She was repeatedly told to stop fighting. A civilian witness, Shawn Cox, came to the officers' assistance and, after seeing Alexander kick Ofc. Whalen in the face, grabbed Alexander's ankles. Cox clearly heard the officers tell Alexander over and over to stop fighting. Cox assisted Ofc. Whalen and Ofc. Zech until back-up units arrived. CP 4.

Ofc. Aagard arrived and saw Alexander handcuffed but still struggling on the ground and screaming. Alexander was screaming and spitting blood. She was told she would be allowed to get up once she calmed down and stopped spitting. When she did so, Alexander was placed in Ofc. Aagard's patrol car. Seattle Fire Department attempted to check Alexander for injuries but she was not cooperative. Fire Department personnel determined Alexander's pulse was fine and that she appeared to have a bloody nose. CP 4.

After being read her constitutional rights, Alexander was asked why she had fought with the officers. Alexander stated, "They don't have any right to stop me and come at me like that." Alexander admitted that she hit Ofc. Whalen but stated, "What is the difference when I hit a cop or they hit me? We are all on the same level." CP 4.

III. ARGUMENT

A. **THE TRIAL COURT PROPERLY FOUND THERE WAS A CAUSAL CONNECTION BETWEEN THE CRIME AND THE INJURIES TO OFC. WHALEN.**

Alexander suggests that there is no causal connection between the crime of disorderly conduct and the injuries suffered by Ofc. Whalen. This argument is without merit.

1. **Relevant facts.**

The State sought restitution, to be paid to City of Seattle Workers Compensation Unit, for the medical expenses incurred as a result of Ofc. Whalen's injuries and for the time she was unable to work due to her injuries. CP 49-86; 3RP 4-5. The trial court held a restitution hearing on November 24, 2008. Ofc. Whalen testified at the hearing. 3RP 6-16. The State submitted documentation to support its restitution request. CP 49-86.

Alexander had not agreed to pay restitution. 3RP 16-25, 34-35. Alexander opposed restitution for the same reasons she now argues on appeal. 3RP 26-29, 33-34. The trial court rejected Alexander's arguments, stating in relevant part:

. . . [In] State v. Thomas . . . the jury acquitted the defendant of vehicular assault and convicted the defendant of DUI, and the court imposed restitution for the damages to the person in the car even though they were acquitted by the jury because the judge found by a preponderance of the evidence there was a casual connection between the DUI and the injury. You don't have to find beyond a reasonable doubt.

I think that case is analogous in the sense that, as you pointed out, we have a stipulation to real facts. The real facts indicate that an assault occurred between the defendant and the detective. She pled guilty to something less than that, just like this Thomas was found guilty of DUI but not the vehicular assault. She testified cogently that there was a casual connection between the injuries she received and obtained treatment for and the actions of Ms. Alexander. I don't think I need to prove beyond a reasonable doubt that she committed the greater offense. I have the real facts that support the analysis.

So I think that's the right analysis counsel, because it's not limited to what are the elements of the crime, and it's not even limited to what the State could prove beyond a reasonable doubt. It's basically: Does a preponderance of the evidence indicate a causal connection between the crime, not the elements of the crime, but the actions taken and the damage? And I think in my mind there's a firm connection there.

3RP 29-30.

2. Legal background: misdemeanor restitution.

A court's power to impose restitution is statutory, not inherent. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Under RCW 9.92.060(2)², RCW 9.95.210(2)³, and RCW 9A.20.030(1)⁴, the superior court has authority to order restitution for gross misdemeanors.

To implement legislative intent, courts interpret restitution statutes broadly to allow restitution. State v. Barr, 99 Wn.2d 75, 78-79, 658 P.2d 1247 (1983) (discussing RCW 9.95.210(2)); State v. Shannahan, 69 Wn. App. 512, 517-18, 849 P.2d 1239 (1993) (applying RCW 9A.20.030). "Restitution is an integral part of the Washington system of criminal justice," and the various restitution

² RCW 9.92.060 authorizes the sentencing court to suspend sentences and subsection (2), in relevant part, gives the sentencing court power to order the defendant "to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question." This statute is applicable to non-felonies and to felonies committed prior to July 1, 1984. RCW 9.92.900.

³ RCW 9.95.210 relates to the granting of probation for non-SRA sentences and subsection (2), in relevant part, provides the court imposing probation power to order the defendant "to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question." This statute is applicable to non-felonies and to felonies committed prior to July 1, 1984. RCW 9.95.900(1).

⁴ RCW 9A.20.030(1) authorizes imposition of restitution in lieu of imposing certain fines and, in relevant part, provides the sentencing court authority to order a defendant who "gained money or property or caused a victim to lose money or property through the commission of a crime, upon conviction thereof ... to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain or victim's loss from the crime."

statutes indicate “a strong public policy to provide restitution whenever possible.” Shannahan, 69 Wn. App. at 517-18.

Under RCW 9.92.060(2) and 9.95.210(2), the trial court can order a defendant convicted of a crime to pay restitution whenever “the crime in question” caused a loss to another. State v. Woods, 90 Wn. App. 904, 907-09, 953 P.2d 834 (1998); State v. Hartwell, 38 Wn. App. 135, 140-41, 684 P.2d 778 (1984) (explaining RCW 9.95.210(2)), overruled on other grounds by State v. Krall, 125 Wn.2d 146, 149, 881 P.2d 1040 (1994); State v. Thomas, 138 Wn. App. 78, 81, 155 P.3d 998 (2007).

Thus, restitution is appropriate if there is a causal connection between the defendant’s crime and the victim’s damages. State v. Enstone, 137 Wn.2d 675, 680, 974 P.2d 828 (1999). 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.⁵ See, e.g., State v. Hahn, 100 Wn. App. 391, 399, 996 P.2d 1125 (2000); State v. Hunotte, 69 Wn. App. 670, 676, 851 P.2d 694 (1993) (a causal connection exists when, *but for the offense committed*, the loss or damages would not have occurred).

⁵ Although some case law previously held that proof that damages were “foreseeable” is also required, the Washington Supreme Court has since ruled otherwise. See Enstone 137 Wn.2d at 680.

Significantly, courts look to the *underlying criminal act established by the conviction*, not to the name or definition of the crime. State v. Landrum, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992) (restitution for the victim's counseling costs for sexual assault was proper even though defendants pleaded to lesser charges of fourth degree assault); State v. Selland, 54 Wn. App. 122, 124, 772 P.2d 534 (1989) (holding that juvenile court is not limited by the definition of the crime of which the defendant was convicted in ordering restitution); State v. Harrington, 56 Wn. App. 176, 179-80, 782 P.2d 1101 (1989); State v. Rogers, 30 Wn. App. 653, 655, 638 P.2d 89 (1981) (upholding \$9,500 restitution order where defendant convicted for possessing stolen truck parts worth between \$250 and \$1,500); State v. Mead, 67 Wn. App. 486, 491, 836 P.2d 257 (1992) (upholding restitution order exceeding the dollar limitation of second degree possession of stolen property); State v. Taylor, 86 Wn. App. 442, 444, 936 P.2d 1218 (1997) (same).

The State need only prove causation by a preponderance of the evidence. State v. Kinneman, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004) (interpreting different but similar restitution statute). Imposition of restitution is generally within the discretion of the trial

court and will not be disturbed on appeal absent an abuse of discretion. Davison, 116 Wn.2d at 919. An abuse of discretion occurs when the decision of the court is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State v. Cunningham, 96 Wn.2d 31, 34, 633 P.2d 886 (1981).

3. A plea to a reduced charge does not preclude restitution on the original charge.

Implicit in Alexander's argument is the assertion that it is improper for the State to seek restitution on a greater charge (here, assault in the third degree) when it has negotiated a plea to a reduced charge. This argument was considered and rejected in State v. S.T., 139 Wn. App. 915, 163 P.3d 796 (2007), a case in which the court was interpreting the juvenile restitution statute:

To the contrary, this court has previously stated that the juvenile restitution statute will not be limited *"simply because a prosecutor may have chosen to charge a person with a lesser offense than the evidence would have permitted."* State v. Selland, 54 Wn. App. 122, 125, 772 P.2d 534 (1989). Limiting restitution by the definition of the crime of which the defendant was convicted *"would severely restrict a prosecutor's ability to negotiate settlements" and would not serve the interest of restoring a victim's loss.* Selland, 54 Wn. App. at 125, 772 P.2d 534.

State v. S.T., 139 Wn. App. at 919 (emphasis added).

In this case, RCW 9.95.210 gives the court imposing probation power to order the defendant "to make restitution to any

person or persons who may have suffered loss or damage by reason of the commission of the crime in question **or** when the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement." RCW 9.95.210(2) (emphasis added).

The "or" in RCW 9.95.210(2) (highlighted above) is in the disjunctive.⁶ Thus, to obtain restitution the State may proceed one of two ways. First, it may prove that restitution is justified because there is a casual connection between the loss and the charged crime. Alternatively, it may negotiate an agreed amount of restitution to reduced charges.

To interpret the statute, as Alexander seems to suggest, to limit restitution to an agreed amount whenever the State reduces a charge or agrees to a negotiated resolution would result in absurd and untenable consequences. It would force the State to conduct unnecessary trials, or file unnecessary charges, simply to preserve

⁶ Courts presume that the word "or" does not mean "and" and that a statute's use of the word "or" is disjunctive to separate phrases unless there is a clear legislative intent to the contrary. Riofta v. State, 134 Wn. App. 669, 682, 142 P.3d 193 (2006); HJS Dev., Inc. v. Pierce County, 148 Wn.2d 451, 473 n.95, 61 P.3d 1141 (2003).

its right to establish a casual connection between the defendant's crime and the resulting loss. As S.T. and Selland make clear, such an untenable result would be unreasonable and contrary to legislative intent.

4. The trial court properly found that there was a causal connection between Alexander's crime and the injury to Ofc. Whalen.

The trial court correctly determined that there was a causal connection between Alexander's underlying criminal behavior and the injuries suffered by Ofc. Whalen. As the trial court emphasized, Alexander had agreed to the "real facts" set forth in the certification for determination of probable cause as part of the plea agreement. The trial court properly considered these facts when evaluating whether the requisite causal connection had been established. The trial court was not limited to simply considering the name of the charged crime or the elements of the charged crime.

A review of the facts set forth in the certification makes it abundantly clear that the injuries suffered by Ofc. Whalen were causally connected, and would not have happened but for, Alexander's actions. Alexander chose to use abusive language when approached by law enforcement officers investigating potential criminal activity. She refused to comply with reasonable

directions and in so doing created a risk of assault. She specifically told the officers she was not going to cooperate. The physical altercation that subsequently ensued would not have happened but for Alexander's behavior. There is a direct causal connection between the crime to which Alexander pled guilty (disorderly conduct) and the subsequent injuries suffered by Ofc. Whalen in subduing Alexander.

The trial court's determination that there was a causal connection between the crime charged and the restitution award is consistent with prior case law.

For example, in State v. Steward, 52 Wn. App. 413, 760 P.2d 939 (1988), the defendant drove a motor vehicle without the permission of its owner.⁷ When one of the tires went flat, the defendant left the vehicle, with the keys in it, in a parking lot in another town. When the owner recovered the vehicle, the four tires and hubcaps were missing, the spare tire was missing, the bumper jack was missing, and some fishing gear that had been in the vehicle was missing. The defendant denied having taken these

⁷ Steward involved a juvenile offender. The restitution statute for juvenile offenders is essentially identical to that for misdemeanors. The juvenile restitution statute provides that restitution must be made "to any persons who have suffered loss or damage as a result of the offense committed by the respondent." RCW 13.40.190(1).

items, and was not charged with theft of the items. Nevertheless, the trial court ordered restitution for these missing items, reasoning that even if the defendant was not directly responsible for the missing items, it was likely, and thus foreseeable to a reasonable person, that the vehicle would be subject to stripping and the theft of its contents. Id. at 414-15. Without endorsing the trial court's foreseeability analysis, the Court of Appeals affirmed, concluding that “[t]he theft occurred as a result of the offense for which Steward was convicted.” Id. at 416.

Likewise, in State v. Blair, 56 Wn. App. 209, 783 P.2d 102 (1989), two juveniles rode from Seattle to Oregon in a motor vehicle that had been taken without the permission of its owner. The vehicle was recovered at the end of a forest service road in Oregon. The ignition had been forced and some of the personal property that had been in the vehicle when it was taken was strewn around the recovery site. In setting restitution, the trial court included sums for loss of personal property that had been inside the vehicle when it was taken. Id. at 211-12. On appeal, the defendants argued that they should not be responsible for theft of the owner's personal property, which potentially occurred outside the charging period and did not result directly from their conduct in

riding in the vehicle, but rather from other, uncharged crimes. Id. at 214. The Court of Appeals rejected this argument and affirmed the award of restitution. Id. at 215.

Finally, as the trial court recognized, State v. Thomas, 138 Wn. App. 78, 81, 155 P.3d 998 (2007), is also on point. In Thomas, the defendant argued that because the jury had only found him guilty of DUI (a misdemeanor) and not vehicular assault (the jury did not enter a verdict on this charge), the trial court could not impose restitution for injuries suffered by the victim of the vehicular assault. The Court of Appeals rejected this argument, noting that the fact the jury failed to find *beyond a reasonable doubt* that the DUI caused the victim's injuries does not preclude the sentencing court from awarding restitution based on a *preponderance* finding that it did.⁸ Id. at 81.

In Steward, Blair, and Thomas an award of restitution was approved for losses that extended beyond the specific crime for

⁸ Alexander attempts to distinguish Thomas on the grounds that in Thomas "the crime of vehicular homicide was still before the court; it had neither been amended nor dismissed." App. Brief at p. 11. First, it is unclear in what sense the vehicular homicide charge was still before the court when the case had proceeded to sentencing on the DUI, the State had clearly abandoned that charge. Second, this interpretation is contrary to the law set forth in the previous section of this memorandum to the effect that the State's decision to amend the charge does not preclude restitution on the original charge. Third, none of the cases cited by Alexander actually involve or interpret a restitution statute.

which the victim was charged. Steward and Blair were not charged with theft of personal property, but the loss of these items was casually connected to the charged crime of taking a motor vehicle without permission and would not have occurred but for the theft of the vehicle. Thomas was not convicted of vehicular assault, but the injuries suffered by the victim were casually connected to his driving while intoxicated.

Likewise, in the present case, Alexander was not charged with assault in the third degree. But the injuries she inflicted on Ofc. Whalen would not have occurred but for her disorderly conduct. This is consistent with the basic principle that, in evaluating the causal connection between the crime and the loss, the courts do not simply look at the name of the crime, but at the underlying actions of the defendant.

The cases relied upon by Alexander in her opening brief are factually distinguishable.

First, Alexander relies on language in State v. Eilts, 94 Wn.2d 489, 495, 617 P.2d 993 (1980), claiming that “the principle enunciated in Eilts has never been overruled.” App. Brief, p. 7. In fact, however, the Supreme Court has recognized that subsequent

legislation – bringing the restitution statute into its current form –
has overruled the holding in Eilts:

The broad language of RCW 9.95.210(2) allows this interpretation. Furthermore, [the trial court's] interpretation of the statute *is most consistent with recent legislative changes in the area. The changes broaden a court's authority to order restitution.* RCW 9.95.210(2) now states that a court may require such monetary payments as are necessary *to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question* or when the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement[.] Laws of 1982, 1st Ex.Sess., ch. 47, § 10, p. 1325. *The language of the new statute effectively overrules our decision in Eilts.* Although the amendment does not govern this case, it clearly indicates the Legislature's intent that this statute be interpreted broadly to allow restitution.

State v. Barr, 99 Wn.2d 75, 78, 658 P.2d 1247 (1983) (citations omitted, emphasis added). Contrary to Alexander's assertion on appeal in this case, Eilts is no longer good law.

Alexander also relies on State v. Miszak, 69 Wn. App. 426, 848 P.2d 1329 (1993). In Miszak, the certification of probable cause for a theft charge set forth four specific items of jewelry taken by the defendant. The defendant pled guilty to attempted theft. At the restitution hearing, the State offered "no evidence whatsoever

to prove that the 13 items had been taken during commission of the charged crime. In fact, the evidence tended to prove the contrary. The victim's letter, which was the sole evidence of loss offered by the State, affirmatively established that the losses took place 'systematically' over a period of 'months.' Thus, the evidence was insufficient to support the restitution order for the entire loss claimed by the victim." Id. at 428. Miszak is a case in which the State sought restitution for losses based on a defendant's general scheme or acts not part of the charge. There was no reliable evidence establishing a causal connection between the restitution sought and the charged crime. In contrast, in Alexander's case, the facts in the certification for determination of probable cause clearly establish the necessary causal connection.

Finally, Alexander relies upon State v. Woods, 90 Wn. App. 904, 953 P.2d 834 (1998). In Woods, the State charged the defendant with stealing a truck in September, but then sought restitution for items taken from the truck in August. The State introduced an unsworn letter from the defendant, thus relying on disputed information outside of the certification for determination of probable cause. Woods stands for the unsurprising conclusion that if the loss or damage occurs *before* the act constituting the crime,

there is no causal connection between the two. Id. at 905-11. In the present case, the State is not seeking to “relate back” Alexander’s conviction so as to impose restitution for acts that occurred prior to the incident.

In sum, the “real facts” set forth in the certification for determination of probable cause, and agreed to by Alexander, establish a clear and direct connection between Alexander’s disorderly conduct and the injuries inflicted on Ofc. Whalen. The trial court did not abuse its discretion in finding that causal connection necessary for awarding restitution had been satisfied.

B. THE TRIAL COURT PROPERLY FOUND THERE WAS A CAUSAL CONNECTION BETWEEN THE RESTITUTION AMOUNT AND OFC. WHALEN’S INJURIES.

Alexander asserts that the State did not establish a proper causal link between the restitution amount and Ofc. Whalen’s injuries. This argument is without merit; the necessary causal link was established by the documentation submitted by the State and Ofc. Whalen’s testimony at the restitution hearing.⁹

⁹ At times in the course of this argument Alexander also appears to be claiming that the State did not establish a causal connection between Alexander’s actions and Ofc. Whalen’s injuries. This argument was addressed by the State in the previous section of this memorandum.

1. Relevant facts.

At the restitution hearing, the trial court indicated that it was relying on the certification for determination of probable cause as evidence of what occurred during the underlying incident. 3RP 5. Ofc. Whalen testified concerning the evidence presented in support of the amount of restitution was sufficient. 3RP 6.

Ofc. Whalen testified that after the incident she suffered from soreness in her neck and shoulder area, ringing in her ears, and dizzy spells. 3RP 7, 9. Her lip was split. 3RP 10. She did not have any of these symptoms prior to the incident involving Alexander on November 6, 2007. 3RP 9, 14. Prior to that date she had never had these problems or sought treatment for these symptoms. 3RP 9.

After the incident, Ofc. Whalen did not immediately seek treatment. The symptoms, however, persisted and got worse: the dizzy spells continued, there was a loss of hearing ("like I was under water or something") and she would "lose balance all of a sudden." 3RP 10.

At this point, Ofc. Whalen went to a doctor and Edmonds Family Medical Center. 3RP 10. She saw one doctor twice and then had follow-up visits with family practitioner. 3RP 10-11. The

primary purpose of these visits was to address the injuries inflicted on her by Alexander. 3RP 11. Between the time of the November 6 incident and her first seeking treatment, Ofc. Whalen did not incur any other injuries, nor did she engage in any activities that might have caused these symptoms. 3RP 11-12.

The family practitioner that Ofc. Whalen saw recommended that she see a physical therapist and the officer did so. 3RP 12-13. Ofc. Whalen had never previously suffered any of the ailments that were addressed during physical therapy and had never seen a physical therapist before. 3RP 13, 15.

Ofc. Whalen missed work as a result of the incident with Alexander. 3RP 13. At first she called in sick. 3RP 13. The doctor she initially saw prescribed painkillers and ibuprofen and advised the officer that it would be best if she did not drive. 3RP 13. Ofc. Whalen was also concerned about driving due to the dizzy spells. 3RP 13. Driving a patrol car was an essential part of her duties. 3RP 14. Ofc. Whalen was told that the symptoms were not going to get better immediately and that she needed to wait until it

got better. 3RP 13. Ofc. Whalen returned to work when the dizzy spells stopped, about two months after the incident.¹⁰ 3RP 14.

Ofc. Whalen submitted the appropriate forms to the Seattle Police Department Worker's Compensation Fund. 3RP 14-15. The doctors she saw forwarded there medical expenses to the Worker's Compensation Fund. 3RP 15.

The State submitted documentation prepared by the City of Seattle Personnel Department. CP 49-86. This established that Ofc. Whalen's time loss amounted to \$5,336.82 for being unable to work on the following days: November 11-13, 14, 27-28 and December 11, 2007. CP 52. Ofc. Whalen missed a total of 31 days of work, for a total cost of \$5,336.82. CP 52. This was the time loss requested by the State at the restitution hearing.

The documentation also included medical insurance claim forms. These forms indicate that Ofc. Whalen sought treatment on nine different occasions over a three month period. The total cost of medical services was \$1,198.40. The insurance claim forms also

¹⁰ The documents submitted by the State and provided by the City of Seattle Personnel Department indicated that Ofc. Whalen missed a total of 31 days of work, for a total cost of \$5,336.82. CP 52. This was the time loss requested by the State at the restitution hearing.

indicate, by use of a code, the basis for the treatment.¹¹ The codes indicate that Ofc. Whalen sought treatment for: “sprain shoulder/ arm,” “dizziness and giddiness,” “sprain of neck” and “pain in limb.” CP 55-57, 60-61, 65-67.

Alexander argued that the State had not met its burden of proof that there was a sufficient basis for estimating the loss incurred by Ofc. Whalen. 3RP 31-33. The trial court rejected Alexander’s argument and imposed restitution for time loss in the amount of \$5,336.82 and medical expenses in the amount of \$1,198.40.

2. Legal standard: restitution amount.

An appellate court will not disturb a sentencing court's restitution award absent an abuse of discretion. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or imposed for untenable reasons. Id. at 679-80. The State is obligated to establish the amount of restitution by a preponderance of the evidence. State v. Burmaster, 96 W. App. 36, 51, 979 P.2d 442 (1999), review granted on other

¹¹ See “Section 21” of each form. See, e.g., CP 54, 59, 64. The State submitted documentation identifying the meaning of each code. See, e.g., CP 55-57, 60-61, 65-67.

grounds, 139 Wn.2d 1014, 994 P.2d 845 (2000); State v. Woods, 90 Wn. App. 904, 907, 953 P.2d 834 (1998).

The amount of restitution must be established by substantial credible evidence; the court must not rely on speculation or conjecture. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). But, damages need not be proven with specific accuracy for purposes of determining the amount of restitution a criminal defendant must pay.¹² State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984).

Evidence of damages is sufficient if it provides the trial court with a reasonable basis for estimating losses and requires no speculation or conjecture. State v. Fleming, 75 Wn. App. 270, 274, 877 P.2d 243 (1994); State v. Pollard, 66 Wn. App. 785, 834 P.2d 51 (1992). The trial court may determine the amount of restitution

¹² While technically not controlling, the SRA standard is illuminating. Under the Sentencing Reform Act:

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.

RCW 9.94A.750(3). Under the SRA, "easily ascertainable" damages "need not be established with specific accuracy." Fleming, 75 Wn. App. at 274; Pollard, 66 Wn. App. at 785.

“by either (1) the defendant's admission or acknowledgment or (2) a preponderance of the evidence.” State v. Ryan, 78 Wn. App. 758, 761, 899 P.2d 825 (1995) (citing State v. Tindal, 50 Wn. App. 401, 403, 748 P.2d 695 (1988)); Enstone, 137 Wn.2d at 682, 974 P.2d 828.

If the record is insufficient to establish the sufficiency of the restitution award, the remedy is to remand for the taking of additional evidence. Dedonado, 99 Wn. App. at 256, 258, (remanding so trial court could fix proper amount of restitution); State v. Hahn, 100 Wn. App. 391, 400, 996 P.2d 1125 (2000).

3. The trial court did not abuse its discretion in finding that the award of restitution was supported by the evidence.

The State established by a preponderance of the evidence that there was a sufficient connection between the restitution amount and Ofc. Whalen's injuries.

Ofc. Whalen testified about the nature of the injuries she suffered as a result of Alexander's assault. She specifically eliminated other possible causes for the injuries. These were not preexisting conditions, the symptoms occurred immediately after the assault, and there was no intervening cause between the time of the assault and her first visit to see a doctor. Ofc. Whalen

testified that doctors prescribed painkillers, told her to take time off, and approved physical therapy. She also testified about the need to take time off to allow the injuries to heal and because the use of painkillers and dizziness prevented her from fulfilling her duties as a law enforcement officer. Finally, the State presented the trial court with documentation of the time loss and medical expenses that corroborated Ofc. Whalen's testimony. In these circumstances, the trial court did not abuse its discretion in determining that the restitution amount was appropriate.

On appeal, Alexander argues that a "causal connection is not established simply because a victim or insurer submits proof of expenditures[.]" But the State has never asserted that the necessary causal connection is met simply by the submission of medical records, nor did the trial court assume that this was the case. The necessary causal connection was established by the documentation provided in conjunction with Ofc. Whalen's testimony.

Unlike the cases relied upon by Alexander, this is not a case in which the only evidence supporting the restitution amount were medical reports. In the present case, Ofc. Whalen testified and her testimony provided a factual basis that established why the medical

services were needed. As discussed above, Ofc. Whalen's testimony was corroborated by the health insurance claim forms submitted by her treatment providers to the City of Seattle. The information in the claim forms correlates with the officer's testimony as to the need for treatment and establishes by a preponderance of the evidence that the medical treatment and time loss was appropriate.

Contrary to Alexander's claim on appeal, this case is remarkably similar to State v. Blanchfield, 126 Wn. App. 235, 108 P.3d 173 (2005), in which a restitution award was upheld based on a summary of the medical records and the victim's testimony as for the purpose of the treatment. Id. at 242.

The cases relied upon by Alexander – State v. Dedonado, 99 Wn. App. 251, 991 P.2d 1216, 1219 (2000); State v. Bunner, 86 Wn. App. 158, 160, 936 P.2d 419 (1997); and State v. Hahn, 100 Wn. App. 391, 400, 996 P.2d 1125 (2000) – are distinguishable because in each case the *only* evidence submitted by the State in support of restitution were medical forms listing medical services charged and the amounts paid. Unlike Dedonado, Bunner, and Hahn, the victim in the present case testified as to the need for the medical treatments she received.

Finally, in opposing the “time loss” requested, Alexander argued below that the State had only established that the officer could not drive a patrol car, but did not consider whether she could have performed some other duties. The trial court addressed this issue in its oral ruling:

And I think what counsel's arguing is that the State has to prove that there wasn't some mitigation that could occur in the sense of alternative duty.

What I'm trying to think of is whether that makes sense in the circumstances of a police officer who ostensibly has to be ready, willing, and able to do their job responsibilities, which would include driving. It would include carrying a firearm. *I'm thinking that if you can't drive because you probably shouldn't be driving, you probably shouldn't be carrying a firearm either.*

3RP 34 (emphasis added). This reasoning is logical, appropriate, and not an abuse of discretion.

In sum, Ofc. Whalen's testimony at the restitution hearing, combined with the time loss data and health insurance claim forms submitted by the State, establish by a preponderance of the evidence that there was a reasonable basis for estimating losses connected without speculation or conjecture. Ofc. Whalen's testimony provided the necessary connection between the raw data in the medical claim forms and her injuries. The trial court did not abuse its discretion in approving the amount of restitution.

C. THE RESTITUTION ORDER DID NOT VIOLATE ALEXANDER'S RIGHT TO DUE PROCESS.

Alexander's claim that her right to due process was violated by the restitution award is without merit.

1. Legal standard: restitution and due process.

Although the setting of restitution is an integral part of sentencing, the rules of evidence do not apply at restitution hearings. State v. Pollard, 66 Wn. App. at 779, 784. Evidence presented at restitution hearings, however, must meet due process requirements, such as providing the defendant with an opportunity to refute the evidence presented, and being reasonably reliable. Pollard, 66 Wn. App. 784-85 (citing State v. Strauss, 119 Wn.2d 401, 418, 832 P.2d 78 (1992)). In other words, the amount of restitution must be established with "substantial credible evidence" which "does not subject the trier of fact to mere speculation or conjecture." State v. Fambrough, 66 Wn. App. 223, 225, 831 P.2d 789 (1992) (citations omitted).

When the evidence is comprised of hearsay statements, the degree of corroboration required by due process is not proof of the truth of the hearsay statements "beyond a reasonable doubt," but rather, proof which gives the defendant a sufficient basis for

rebuttal. State v. S.S., 67 Wn. App. 800, 807-08, 840 P.2d 891 (1992); see generally State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993).

2. Alexander's right to due process was not violated.

There was no violation of Alexander's right to due process. Most basically, unlike the sole case relied upon by Alexander on appeal, Ofc. Whalen testified at the restitution hearing and she was subject to cross-examination (although Alexander chose not to do so). In addition, the State provided Alexander with the medical claims forms and time loss forms in advance of the hearing; sufficiently in advance for Alexander to discuss these documents in her brief opposing restitution. CP 26-41. Alexander was not surprised by the introduction of this information. These documents – which indicated the treatment dates, the cost of the treatment, and the basis of Ofc. Whalen's medical complaints – provided Alexander with an adequate opportunity to prepare an argument in rebuttal. If Alexander had wished to challenge or rebut the information submitted by the State, she was in a position to do so at the restitution hearing.

State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993), the sole case relied upon by Alexander in support of her due

process claim, is readily distinguishable. Unlike the present case, the only loss information presented in Kisor was an affidavit which contained hearsay allegations. Worse, the affidavit was “nothing more than a rough estimate of the costs associated with purchasing a new animal and training it.” The Court of Appeals concluded the “affidavit is not substantial credible evidence of the restitution figure set by the court” and that “[d]ue process was offended by the trial court's reliance upon the State's affidavit.” Id. at 620. There was no opportunity to cross-examine the individual who prepared the affidavit and the amorphous nature of the amount claimed made it difficult to rebut. In these circumstances, the Court of Appeals properly found that Kisor's due process rights had been violated.

In contrast, in the present case Ofc. Whalen testified at the restitution hearing, the documentation provided by the State was specific and detailed (not just a “rough estimate”). While this documentation is hearsay, it is not precluded – and due process is not offended – by its introduction in a restitution proceeding. As discussed above, Ofc. Whalen's testimony established that the documentation was reasonably reliable. Finally, Alexander was provided with enough detail, and a more than adequate opportunity,

to rebut the State's restitution request. There was no due process violation.

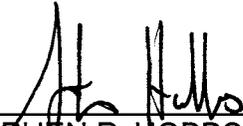
IV. CONCLUSION

For the reasons stated above, the State of Washington respectfully requests that the award of restitution imposed as a condition of Alexander's probation be affirmed.

DATED this 2nd day of October, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to SUSAN WILK, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ALEXANDER ASHLEY, Cause No. 62891-7-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame

Name

Done in Seattle, Washington

10/2/09

Date