

NO. 63353-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VAN TINH TRAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PARIS KALLAS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

FLETCHER B. EVANS
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

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A. ISSUES PRESENTED

1. Restitution must generally be imposed within 180 days of sentencing. That deadline can be extended for good cause. Here, the court continued several restitution hearings that had been set before the 180-day expiration. At a restitution hearing set on the last day of speedy restitution, the State submitted evidentiary documents and argued in favor of restitution. The defendant's attorney argued against restitution. The court then granted a good cause continuance because the defendant wished to address the court but didn't have an interpreter. A week later, the court again continued the hearing for lack of an interpreter. At the final restitution hearing, the defendant finally had an opportunity to address the court. The court then granted full restitution in favor of the State. Given that the final restitution hearing happened more than 180 days after the defendant's sentencing, was restitution imposed in a timely manner?

2. Trial courts have broad authority to order restitution. Here, the defendant hit the victim in the chest and head with a sledgehammer during the assault. The court ordered full restitution, finding that the defendant should pay for the victim's lost

earnings as the victim missed a work opportunity due to the assault. Did the trial court abuse its discretion?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Van Tinh Tran, was charged with one count of Assault in the Third Degree for striking victim Mark Bews with a sledgehammer and one count of Assault in the Fourth Degree for kicking victim Annie Bews in her back. CP 30. Through negotiations, the State amended the charges against Tran to one count of Assault in the Fourth Degree against Mark Bews and Annie Bews¹. CP 40. Tran entered an Alford plea to the amended charge, and the sentencing court imposed a deferred sentence of twelve months on September 12, 2008. CP 35-39, 3-5. The conditions at sentencing included the payment of any restitution arising from the assault, to be determined at a restitution hearing. CP 4. At a restitution hearing on March 31, 2009, the court ordered restitution in the amount of \$29,940.40 which comprised of \$28,000 in lost earnings to Mark Bews and \$1,940.40 to the Crime Victim's Compensation Program

¹ The victims were named together in the one count.

(hereinafter "CVC") for medical bills. CP 12-13. Tran timely appeals.
CP 14.

2. SUBSTANTIVE FACTS²

On December 15, 2007, victim Mark Bews took his wife Annie Bews and their young child to look at a house on South Ferdinand Street in Seattle. When Bews parked his car in the driveway of the house, Tran and his son John Nguyen came out of the house. Tran told Bews to move his car. When Bews started to get back into his car, Nguyen struck Bews in the back. Both Tran and Nguyen then began assaulting Bews with their hands and feet, striking Bews in the head and body. While holding her son, Annie Bews attempted to stop the fight and Tran kicked her in the back and chest.

During the altercation, Tran obtained a sledgehammer from his truck which he used to strike Bews in the head and chest. Bews tried to flee from Tran and Nguyen by crossing the street, but they followed him and continued with the assault. Two witnesses in addition to Annie Bews observed the assault. Both witnesses

² As part of the Alford plea, Tran stipulated to the facts contained in the Certification for Determination of Probable Cause. CP 41-42. The following substantive facts are drawn from that document.

observed Tran and Nguyen assaulting Bews while he was on the ground. One of the witnesses observed Bews being attacked by a man with a sledgehammer.

When Seattle Police Department Officer Grossfeld arrived at the scene, he found Tran standing in front of his house. Officer Grossfeld observed blood on Tran's face and clothes. Tran told Officer Grossfeld that he had obtained the sledgehammer for self-defense purposes. Officer Grossfeld found the sledgehammer inside Tran's vehicle, and Tran admitted that it was the sledgehammer he had used.

3. THE RESTITUTION HEARING

Under the speedy restitution statutory guidelines, the State had until March 10, 2009 to hold a restitution hearing. CP 7. A restitution hearing was scheduled for February 26, 2009, but the court continued the hearing to March 5, 2009 because of court closure due to inclement weather. CP 6. On March 5, 2009, the State moved for a short continuance within speedy restitution so that Bews could be present for the hearing. CP 7. In granting the

State's request, the Court noted that the matter was being continued to March 10, 2009 – the last day of speedy restitution.

Id.

At the March 10th hearing, the State first argued for \$1,940.40 to be paid to CVC for medical bills associated with the assault. 3/10/09 RP 4. In support of this request, the State relied upon an officially prepared document that noted medical expenses associated with the assault. 3/10/09 RP 4-5; CP 51-53.

After addressing restitution for medical bills, the State next requested restitution for earnings Bews lost as a result of the assault. 3/10/09 RP 5. Bews is a house framer in the construction industry. 3/10/09 RP 5. Prior to the assault, Bews had done house framing for Brian Johnson of Go Go Designs. 3/10/09 RP 5-6; CP 49. In the time period between May and August of 2006, Bews had worked for Johnson and earned \$22,521. 3/10/09 RP 5-6; CP 49-50. Given the amount of time it took to complete those projects and the amount of money Johnson paid to Bews, Johnson calculated that Bews had earned \$70 per hour. 3/10/09 RP 6; CP 49.

After the assault, Johnson contacted Bews on December 21, 2007 to frame two houses. 3/10/09 RP 6; CP 49. The work would

have taken eight to ten weeks to complete. 3/10/09 RP 6-7; CP 49. Bews had to decline the work because he was still suffering from head injuries stemming from the assault. 3/10/09 RP 6; CP 49. The work offered to Bews actually took longer than ten weeks because Johnson had to do the work himself and lacked the expertise of a house framer. 3/10/09 RP 7.

The State requested a total of \$28,000 in lost earnings. 3/10/09 RP 6; CP 12. In reaching this amount in lost earnings, the State took Bews' hourly wage as determined by Johnson and multiplied that by ten forty-hour work weeks. 3/10/09 RP 6-7; CP 49.

In addition to the letter from Johnson and the W2 statement, the State submitted two other documents in support of the request for \$28,000. Bews submitted a written affidavit signed under penalty of perjury in which he calculated \$28,000 in lost earnings using the previously-mentioned formula. 3/10/09 RP 7; CP 48. The State also submitted a signed hand-written letter on Valley Medical Center stationary from Bews' doctor Yahua Yu. 3/10/09 RP 7, 10-11; CP 54. Doctor Yu's letter acknowledged the assault on December 15, 2007 and noted that Bews was unable to work from December 15, 2007 to February of 2008 due to headaches,

memory loss, and vertigo. CP 54. The State acknowledged that Dr. Yu began treating Bews several months after the incident, but pointed out that she saw Bews on three different occasions for headaches. 3/10/09 RP 7-8.

Tran's attorney argued that the medical bills should not be awarded to CVC in this matter because two people appeared to have assaulted Bews, and therefore it could not be determined who actually injured Bews. 3/10/09 RP 8-10. The court noted that the medical bills stemming from the assault were easily ascertainable, and that Tran had been convicted of the crime. 3/10/09 RP 10.

Focusing next on the claim for lost earnings, Tran's attorney argued that the letter from Dr. Yu was hearsay and contained no objective findings on how Dr. Yu came to her conclusion. 3/10/09 RP 10-11. This completed counsel's argument against restitution for lost earnings.

Tran himself wished to address the court, but was unable to do so because an interpreter had not been ordered. 3/10/09 RP 11-12. Because Tran himself wished to address the court, and because an interpreter had not been ordered, the court found good cause to continue the hearing on the last day of speedy restitution. 3/10/09 RP 12. The court's order of continuance noted the need to

have an interpreter present, that the matter was being continued beyond the 180-day speedy restitution time frame, and that argument from both parties had been heard. CP 8. Tran did not object to the continuance.

Counsel for the State noted that he would be out of the country from March 18 to March 29, but that coverage could be arranged. 3/10/09 RP 12. The court scheduled the next restitution hearing for March 17, 2009. CP 8.

The restitution hearing reconvened on March 17, 2009, but once again Tran could not address the court because an interpreter was not present. CP 10. The court again found good cause to continue the hearing for the purpose of allowing Tran to address the court, and Tran did not object to the continuance. Id. The hearing was continued to March 31, 2009. Id.

On March 31, 2009, the court acknowledged that the State had previously made a presentation with regards to restitution, but invited the State to address the court rather than simply relying on what had been argued before. 3/31/09 RP 3-4. The State again made its request for restitution, but did not offer any additional evidence from what had been previously submitted on March 10th. 3/31/09 RP 4-5.

Tran's attorney was then given an opportunity to address the court, and he made additional arguments against restitution that had not previously been made on March 10th. 3/31/09 RP 6-9. Tran argued that the letter from Johnson should not be considered because it was unsigned, hearsay, and not supported by any additional documentation. 3/31/09 RP 6. Tran's attorney also argued that the W2 statement lacked details regarding how and when Bews earned the \$22,521. 3/31/09 RP 6-7. Tran's attorney again addressed the letter from Dr. Yu, this time pointing out that Dr. Yu did not treat Bews immediately after the incident. 3/31/09 RP 7.

Tran himself then had an opportunity to address the court through a court-certified interpreter. 3/31/09 RP 3, 10-11. Tran noted that he had acted in self-defense throughout the incident, that he had difficulty explaining to law enforcement his version of the facts, and that Nguyen had been seriously injured during the incident. Id.

Having now heard fully from both parties, the court ruled in favor of the State and awarded full restitution. 3/31/09 RP 12; CP 12-13. The court began by noting the existence of a causal connection between the assault and the requested restitution.

3/31/09 RP 12. The court found Dr. Yu's signed letter to be sufficient evidence as it was written on official letterhead. Id. In response to Tran's argument that the letter from Dr. Yu lacked support for its assertions, the court stated that the letter need not be accompanied by additional chart notes. Id. The court also acknowledged the sufficiency of Bews' affidavit signed under penalty of perjury. Id. With regards to Johnson's letter, the court viewed that evidence as additional corroboration of the fact that Bews had lost earnings because of the assault. Id. The court noted in the written order granting restitution that the State had carried its burden of proof and that Tran's objections were overruled. CP 13.

C. ARGUMENT

1. THIS COURT SHOULD AFFIRM THE SENTENCING COURT'S DECISION TO ORDER RESTITUTION FOR MEDICAL BILLS AND LOST EARNINGS STEMMING FROM THE ASSAULT

a. Relevant Law.

Under RCW 9.94A.753(5), a sentencing court shall order restitution "whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property."

There are a number of identified purposes for restitution. The most commonly advanced are to punish defendants, to force them to face the consequences of their actions, and to compensate victims for their losses. See, e.g., State v. Davison, 116 Wn.2d 917, 920, 809 P.2d 1374 (1991); State v. Fleming, 75 Wn. App. 270, 275, 877 P.2d 243 (1994); State v. Mead, 67 Wn. App. 486, 490, 836 P.2d 257 (1992). Restitution attempts to achieve these purposes by requiring the defendant to pay – as much as is possible – to restore the victim to the same position he or she was in before the crime was committed.

In this regard, the Legislature has expressed a strong desire that an offender pay restitution to the victims of their crimes. State v. Tobin, 132 Wn. App. 161, 175, 130 P.3d 426 (2006). Therefore, while a trial court's authority to order restitution is purely statutory, the statute gives "the trial court broad powers of restitution." State v. Fleming, 75 Wn. App. 270, 274, 877 P.2d 243 (1994). Thus, statutes authorizing restitution should not be given an overly technical construction that would permit a defendant to escape from just punishment. Id. Rather, the restitution statutes are to be interpreted broadly to carry out the Legislature's intent. State v.

Israel, 113 Wn. App. 243, 299, 54 P.3d 1218 (2002); State v. Hennings, 129 Wn.2d 512, 519, 919 P.2d 580 (1996).

When exercising this broad authority, trial courts are to be guided by two principles. First, there must be a causal connection between the crime committed and the given loss. State v. Enstone, 137 Wn.2d 675, 974 P.2d 828 (1999). Second, the amount of the loss must be “easily ascertainable.” Id.

A causal connection exists when, “but for” the offense committed, the loss or damages would not have occurred. State v. Hunotte, 69 Wn. App. 670, 676, 851 P.2d 694 (1993). It is not required that the specific injury or method of injury be foreseeable. Enstone, 137 Wn.2d at 682.

Once the fact of damage is shown, the specific amount does not need to be proven with specific accuracy or mathematical certainty. State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984) (citing State v. Bush, 34 Wn. App. 121, 659 P.2d 1127 (1983)). Rather, the amount of loss is “easily ascertainable” if it “affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture. Mark, 36 Wn. App. at 434. Within these constraints the court has broad discretion to determine what is included in the “amount of loss.”

The rules of evidence do not apply to restitution hearings, but the evidence must be sufficient and reliable. State v. Pollard, 66 Wn. App. 779, 784-85, 834 P.2d 51 (1992) (citing RCW 9.94A.370(2)). Additionally, the evidence submitted at a restitution hearing must meet due process requirements. Id. The evidentiary standard at a restitution hearing is preponderance of the evidence. Id. at 783-84.

As a result of the trial court's broad power to order restitution, this Court reviews a trial court's order only for abuse of discretion. State v. Hunotte, 69 Wn. App. 670, 674, 851 P.2d 694 (1993); Davison, 116 Wn.2d at 919 (imposition of restitution is generally within trial court's discretion and will not be disturbed on appeal absent abuse of discretion). Therefore, this Court reverses a restitution award only when it is manifestly unreasonable or based on untenable grounds or reasons. Enstone, 137 Wn.2d at 679.

RCW 9.94A.753(1) specifies that:

When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause.

This 180-day deadline is mandatory unless the hearing is continued

for good cause. State v. Johnson, 96 Wn. App. 813, 816, 981 P.2d 24 (1991). Such a motion to continue must be made before the 180 days have elapsed. Id. at 816-17. A sentencing court's decision whether there is good cause to continue the restitution hearing is also reviewed for abuse of discretion. See, e.g., State v. Johnson, 132 Wn. App. 400, 413-14, 132 P.3d 737 (2006) (defendant failed to demonstrate that trial court abused its discretion in finding good cause to continue trial date).

b. The 180-Day Deadline Was Met, And Good Cause Existed To Continue The Hearing Past The 180-Day Deadline.

This Court has explicitly analogized the time limit for determination of restitution to time limits in the criminal statute of limitations and the criminal rules requiring trial to occur within a certain amount of time. See State v. Duvall, 86 Wn. App. 871, 940 P.2d 671 (1997).³ In those contexts, Washington courts have repeatedly held that the *initiation* of the necessary legal action prior to the relevant deadline is sufficient to comply with the requirement,

³ In Duvall, this Court addressed the 60-day deadline in the version of the restitution statute in effect in 1994. 86 Wn. App. at 872-73. With the exception of the change from 60 to 180 days, the phrase at issue in that version of the statute is virtually identical to the one currently in effect.

even if the legal action is not *concluded* until after the deadline has passed. For example, where a criminal trial is started before the time limit enumerated in CrR 3.3 has passed, then the rule is satisfied even if the trial does not finish until afterward. See State v. Andrews, 66 Wn. App. 804, 810-11, 832 P.2d 1373 (1992).

Similarly, where criminal charges against a defendant are commenced prior to the running of the statute of limitations, the statute is satisfied even if the charges are not resolved until afterward. See State v. Koch, 38 Wn. App. 457, 685 P.2d 656 (1984).

In Duvall, this Court held that the purpose of the timeline for determination of restitution is the same as the purposes of the timelines in the statute of limitations and the time for trial rules.

This Court stated:

[T]he purpose for the mandatory 60-day (now 180-day) limit is to avoid delay in the resolution of a criminal charge. As with the rules mandating prompt arraignment and speedy trial, the underlying policy is “that it is in the best interest of all concerned that criminal matters be tried while they are fresh.”

Duvall, 86 Wn. App. at 875-76 (citations omitted). As a result, this Court should conclude that – like the statute of limitations and the time for trial rules – the timeliness requirement in RCW

9.94A.753(1) is met with when the restitution hearing is *initiated* prior to the deadline, even if it is not *completed* until after the 180 days have passed.

As noted above, RCW 9.94A.753(1) specifically states that "the court may continue the hearing beyond the one hundred eighty days for *good cause*." In this context, "good cause" to continue "requires a showing of some external impediment that did not result from a self-created hardship that would prevent a party from complying with statutory requirements. Inadvertence or attorney oversight is not good cause." State v. Reed, 103 Wn. App. 261, 265 n.4, 12 P.3d 151 (2000) (citing State v. Tomal, 133 Wn.2d 985, 989, 948 P.2d 833 (1997)).

It is undisputed that the court continued the restitution hearing to March 10, 2009 – exactly 180 days after Tran's sentencing. However, the State presented all evidentiary documents and made all arguments in support of restitution on March 10th. Even though the court allowed the State the opportunity to renew its argument for restitution on March 31st, the State did not present any additional evidence or make any new arguments on that date. Thus, Tran cannot claim that continuing the hearing to March 31st prejudiced him in any way.

The court granted a good cause continuance solely for the purpose of letting Tran address the court. This was the only reason for the good cause continuance on both March 10th and March 17th. Because the continuance was requested by Tran, he did not object to the good cause continuances on March 10th and March 17th. In granting the initial continuance beyond speedy restitution, the court specifically noted that argument had been heard from both parties, further solidifying the court's decision to grant the good cause continuance.

While the State did not present any additional evidence or make any additional arguments at the March 31st restitution hearing, Tran's attorney took the opportunity to expand on his initial arguments from March 10th. On March 10th, Tran's attorney argued only that the medical bills were not easily ascertainable and that Dr. Yu's letter should not be considered by the court on sufficiency grounds. On March 31st, however, Tran's attorney made additional argument focusing on Johnson's letter and the W2 statement submitted by the State.

The State is not alleging that it was improper for Tran's attorney to have made additional arguments at the March 31st hearing. However, it is disingenuous for Tran to now argue a

speedy restitution violation. The good cause continuances were granted solely at the request of Tran, and for his benefit. The lack of an interpreter on both March 10th and March 17th is certainly an “external impediment” that would require a continuance under State v. Reed. Tran took advantage of the continuances to further his argument against restitution. Given the facts in this case, the court did not abuse its discretion in continuing the restitution beyond the 180-day speedy restitution deadline as the continuances were for the benefit of Tran, and the State made its arguments for restitution within the time allotted for speedy restitution.

c. The Court’s Order Granting Restitution Was Based On A Causal Connection Between The Crime And The Losses Sought, And The Losses Were Easily Ascertainable.

Although Tran objected to the court granting restitution to CVC in the amount of \$1,940.40, he is not arguing this issue on appeal. Tran’s appeal addresses only the \$28,000 awarded to Bews for lost earnings. The State will therefore address only the lost earnings component of the court’s restitution order.

The State showed a clear causal connection between the assault and the amount requested. It is clear from the Certification

for Determination of Probable Cause that Tran struck Bews in the head with a sledgehammer. Johnson contacted Bews six days after the assault to hire him on a project, but Bews could not accept the work due to his injuries. This, along with the fact that Bews had worked for Johnson in the past, is reflected in Johnson's letter to the court. Bews' signed affidavit reflects the fact that he had to pass on Johnson's employment offer. The court also reviewed a signed letter from Dr. Yu on Valley Medical Center letterhead noting that Bews could not work from December 15, 2007 (the date of the assault) until February 2008 due to head injuries sustained during the assault. This evidence clearly supports a causal connection between the offense and the lost earnings restitution awarded to Bews. "But for" the head injuries Bews incurred during the assault, he would have accepted the work from Johnson as he had in the past.

Having established a causal connection between the offense and the restitution requested, the focus turns to whether the amount of lost earnings in this matter is easily ascertainable. In Bews' signed affidavit, he notes the mathematical formula he used in requesting \$28,000 in lost earnings. Bews begins by claiming his work as a house framer is worth \$70 per hour, which is the same

figure Johnson notes as Bews' hourly wage for past work. Bews then notes that he lost out on 400 hours of work, which is the sum of ten weeks worth of work at forty hours per week. This figure again comports with Johnson's belief that the work in question would have lasted between eight to ten weeks. This figure is accurate, as it actually took longer than ten weeks for Johnson to complete the work.

As noted in State v. Mark and State v. Bush, specific amounts of loss do not need to be proven with specific accuracy or mathematical certainty. While it will be impossible to know exactly how much income Bews lost, the logic behind the calculations of Bews and Johnson is sound. Given this information, the court's decision to award lost earnings restitution was not mere speculation or conjecture.

Even though he acknowledges that the rules of evidence do not apply to a restitution hearing, Tran nonetheless argues that the State's documents are not reliable for various reasons. The trial court overruled Tran's objections at the restitution hearing. The court found that Bews' affidavit, signed under penalty of perjury, was sufficient. The court then ruled that Johnson's letter is additional evidence that corroborates Bews' affidavit. The court

also noted that Dr. Yu treated Bews for the head injuries stemming from the assault, and provided a signed letter on official letterhead noting that Bews could not work during the time period in question due to his head injuries. The court noted that it did not need additional chart notes supporting Dr. Yu's letter. The court had reliable and sufficient evidence at the restitution hearing, and Tran had ample opportunity to refute the evidence. Therefore, the court did not abuse its discretion in considering the State's evidence.

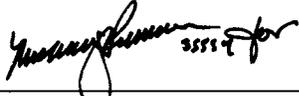
D. CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm the order of restitution entered by the sentencing court in this matter.

DATED this 18th day of March, 2010.

Respectfully submitted,

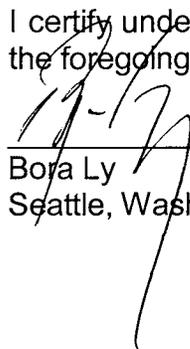
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
FLETCHER B. EVANS, WSBA #36607
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Dean D. Nguyen, the attorney for the appellant, at 1700 7th Ave. Ste 1200, Seattle WA 98101-1360, containing a copy of the Brief of Respondent in STATE V. VAN TINH TRAN, Cause No. 63353-8-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.



Bora Ly
Seattle, Washington

03/18/2010
March 18, 2010