

67718-7

67718-7

NO. 67718-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MARKNSEN,

Appellant.

2012 JUN 10 PM 2:33

COURT OF APPEALS
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. An award of restitution is appropriate where the State has proven that the losses were caused by the crimes to which a defendant pled guilty. Here, Marknsen pled guilty to two crimes pertaining to Kirsten Theotig, an ex-girlfriend: obtaining a signature by deception or duress - domestic violence, and theft in the first degree. These crimes involved deception and coercion of the victim, and evidence made it clear that these crimes caused her to take time off from work, to seek medical help, to attend counseling, and to retain legal assistance. Was restitution appropriately imposed for losses caused by the Marknsen's criminal conduct?

2. A sentencing court can impose attorney's fees when it has considered a defendant's ability to pay. Here, the court heard evidence that Marknsen's crime involved him personally obtaining tens of thousands of dollars, that Marknsen acknowledged owning a business with fifteen employees, and that the victim investigated and found Marknsen to have control of numerous assets. Did the court properly impose attorney's fees?

B. STATEMENT OF FACTS

The defendant, Michael Marknsen, pleaded guilty on December 20, 2010, to two counts of theft in the first degree, one count of obtaining a signature by deception or duress (DV), and one count of attempted theft in the first degree. CP 27. The first three counts arose from an extended episode in which Marknsen coerced his then-girlfriend, Kirsten Theotig, into signing and submitting a loan application to Washington Mutual in order to refinance her mortgage. CP 5-7. The application was prepared by Marknsen, and contained numerous falsehoods that were relied upon by Washington Mutual to its detriment, as it approved the application and extended financing that totaled \$649,000. Id. Theotig was reluctant to sign the papers, but she was in a physically and emotionally abusive relationship with Marknsen, and Marknsen threatened physical harm if she did not sign the papers. CP 5.

Upon closing, proceeds from the loan were to be used to pay a number of credit card debts incurred in Theotig's name. CP 5-7. Unfortunately, Marknsen manipulated the closing process and acquired possession of the checks that the escrow agency had written on behalf of Theotig to her creditors, and converted them to

his own use. Id. Marknsen also "awarded" himself an origination fee as the preparer of Theotig's loan application, and was paid a loan origination fee of \$31,551 at closing. Id. He also diverted checks intended to pay off Theotig's credit cards and totaling \$51,615 to himself. Id. As part of the plea agreement, Marknsen stipulated that the facts in the certification for determination of probable cause and the prosecutor's supplemental case summaries were real and material facts for purposes of sentencing. CP 27-59.

At a contested restitution hearing, the State sought restitution on behalf of Theotig and the FDIC (as successor to Washington Mutual). Appendix A; 8/15/11 RP 1-29. The State presented evidence that Marknsen's crimes caused Theotig to lose her home, ruined her finances, and affected her physical and emotional health. Id. A total of \$62,611.26 was sought in restitution. Id. Of this amount, \$24,300 was requested for Theotig for wages lost when she took 15 weeks off from work from November, 2010 through February of 2011 to deal with severe emotional problems caused by Marknsen's crimes. Id. Prescription and counseling costs incurred by Theotig as a result of this case amounted to another \$224.18 requested for Theotig, and \$1,467.66 requested for her health care provider, Anthem Blue Cross. Id.

Theotig also sought legal counsel to assist her in filing for bankruptcy, securing a no-contact order against Marknsen, and to explore the possibility of filing a civil suit. \$15,970 were requested for this legal assistance, with \$2,520 for the services of attorney Dallas Jolley and \$12,970 for the services of the Fink Law Firm. Id. Theotig did not file a civil suit because she determined that while Marknsen had numerous assets including cars and houses, he had these assets in other people's names. 2/18/11 RP 10.

At the restitution hearing, Marknsen objected to the imposition of restitution to Theotig for her lost work, medical costs, and legal costs. 8/15/11 RP 21-23. The court imposed all of the restitution requested, finding that "the restitution requested here is a part of the things that were charged in this case." 8/15/11 RP 26. Over Marknsen's objections, the court also ordered Marknsen pay \$77,942.12 in attorney fees to the King County Office of Public Defense. 2/18/11 RP 22-23; 8/15/11 RP 28.

Marknsen appealed the order setting restitution and the order for recoupment of attorney's fees. CP 97.

C. ARGUMENT

1. THE SENTENCING COURT PROPERLY IMPOSED RESTITUTION FOR LOSSES THAT THE STATE PROVED WERE CAUSALLY RELATED TO THE DOMESTIC VIOLENCE FINANCIAL CRIMES TO WHICH THE DEFENDANT PLED GUILTY.

In Washington, the authority to order restitution is purely statutory. State v. Hennings, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). Restitution is sanctioned by RCW 9.94A.753, which provides, in pertinent part:

[R]estitution 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... 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.753(3).

Though the term "injury" is not defined in RCW 9.94A.753 or elsewhere in the Sentencing Reform Act (SRA), the term "victim" is. A person is made a "victim" when a defendant inflicts on her any of several kinds of injuries, not limited to physical damage or monetary loss:

"Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.

RCW 9.94A.030(52).

A sentencing court can rely on "no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216, 1219 (2000). If a defendant disputes material facts for purposes of restitution, then a sentencing court can either not consider those facts or it can grant an evidentiary hearing where the restitution amount must be proven by the State by a preponderance of the evidence. Id. "Restitution does not need to be proven with specific accuracy. Evidence is sufficient if it affords a reasonable basis for estimating loss. However, restitution must be based on a causal connection between the crime and the victim's damages." Id. (Citations omitted.) A causal connection is one in which losses would not have been incurred "but for" the crime. State v. Acevedo, 159 Wn. App. 221, 230, 248 P.3d 526 (2011). Restitution cannot be imposed based on a defendant's "general scheme" or acts "connected with" the crime charged, if those actions are not part of

the charge. State v. Oakley, 158 Wn. App. 544, 552, 242 P.3d 886 (2010).

Washington's restitution laws are meant to have a "strong punitive flavor." State v. Davison, 116 Wn.2d 917, 920, 809 P.3d 1374 (1991). The Washington State Supreme Court has cautioned against giving the restitution statutes "an overly technical construction which would permit the defendant to escape from just punishment." State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). Imposition of restitution is within the trial court's discretion, and will generally be upheld on appeal absent an abuse of that discretion. State v. Enstone, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). However, the determination of whether losses are causally connected to the crime for which a defendant was convicted is a question of law, and therefore is reviewed de novo. State v. Acevedo, 159 Wn. App. at 229-30.

Here, Marknsen challenged the causal connection between his actions and the restitution requested by the State on behalf of Theotig. The trial court found a causal connection, and Marknsen now asks that the restitution awarded to Theotig be reversed. This request should be denied, as Marknsen's actions clearly resulted in the destruction of Theotig's financial and credit health and forced

her into a costly bankruptcy and the loss of her home. Washington courts have long recognized that money spent by a victim as a direct result of the defendant's criminal conduct constitutes a recoverable loss under the state's restitution laws. See, e.g., State v. Smith, 119 Wn.2d at 388-90 (holding that funds spent to reload and reset surveillance cameras following a burglary are compensable); State v. Davison, 116 Wn.2d at 918-22 (affirming restitution order reimbursing employer for wages it paid assault victim while he recovered from assault-related injuries); State v. Johnson, 69 Wn. App. 189, 192-95, 847 P.2d 960 (1993) (ruling that victim business was entitled to restitution for cost of investigative expenses incurred in determining amount of money embezzled by defendant-employee).

Marknsen argues that the court erred in ordering restitution for Theotig's time off from work, counseling, medication, and legal costs, as these losses arose from the abusive relationship that Theotig endured at the hands of Marknsen rather than from the financial crimes to which he pled guilty. However, the abuse suffered by Theotig in her relationship with Marknsen and the financial crimes she was victim to were tightly related and the conduct cannot be separated. As was established in the charging

language, in the Certification for Determination of Probable Cause, in the plea documents, at the sentencing hearing, and at the restitution hearing, the physical and emotional abuse inflicted by Marknsen was a key part of enabling his financial crimes and the effects of his crimes were felt by Theotig in many ways after the initial commission of the crimes.

- a. The Missed Work, Counseling Costs, And Medical Costs Were Incurred As A Direct Result Of The Domestic Violence Financial Crimes That Marknsen Pleaded Guilty To.

In support of the request for restitution, the State submitted a letter from Ms. Theotig's psychiatrist. It stated:

I first saw Ms. Theotig on 11/10/2010 for a psychiatric evaluation because of severe depression following her broken relationship with her boyfriend Mark Marknsen. He was physically abusive and illegally did away with all her money causing her to be a financial wreck. He stalked her after his is [sic] release from prison. He had raped her roommate. Ms. Theotig became extremely anxious, fearful, could not go to work and went on disability.

Appendix B at 2.

Marknsen argues that this letter establishes that the "cause of the missed work and medical treatment was the alleged stalking and rape that occurred years after the thefts at issue here."

Appellant's Brief at 7. This is clearly an incorrect interpretation, as the letter specifically mentions the financial crimes, stating that Marknsen "was physically abusive and *illegally did away with all her money causing her to be a financial wreck...*" (emphasis added). It then notes the stalking and the rape as distinct elements of the causes for Theotig's depression. The conclusion of the letter comes after listing all these factors: "Ms. Theotig became extremely anxious, fearful, could not go to work and went on disability." At no point does it say that it was solely the stalking, or solely the rape, that formed the basis for the anxiety and missed work.

Quite the contrary, the physical abuse and financial fraud are mentioned together in the same sentence, and are the first factors listed as causing Theotig to become depressed and seek psychiatric help. Moreover, one of the crimes underlying the restitution for Theotig was the crime of obtaining a signature by deception or duress - domestic violence. Marknsen entered a plea to this charge as well as to theft charges and Theotig testified at the sentencing hearing as to the abusive nature of their relationship and how Marknsen used this relationship with her to coerce her into giving her signature. Theotig further made it clear at the restitution hearing that she missed work due to the domestic violence she

suffered at the hands of Marknsen, as well as from "sustaining financial hardships after the crimes and after the pleas and the Court dates." 8/15/11 RP 14. Given all this, the court found a causal relationship, noting that "it's quite clear that the time period she [Theotig] was off from work was directly relates to this case..." 8/15/11 RP 26. Because the loss of work and the counseling and medical expenses were directly related to Marknsen's crimes, they formed an appropriate basis for restitution. State v. Davison, 116 Wn.2d at 921-22 (affirming restitution order reimbursing employer for wages it paid assault victim while he recovered from assault-related injuries). As the injuries were causally connected to the charged offense, those injuries need not have been foreseeable to Marknsen in order for him to be held financially responsible. State v. Enstone, 137 Wn.2d at 680.

Marknsen's brief acknowledges that restitution for lost work and counseling is appropriate in certain cases, noting that "If Mr. Marknsen is charged with and convicted of stalking and rape, restitution for lost work and psychiatric treatment may be imposed in that case." Appellant's Brief at fn. 2. Yet the possibility that Marknsen may be culpable of other crimes, and that restitution could be properly imposed for these other crimes, does not by itself

prohibit restitution being imposed in this case. Restitution could certainly be proper in those circumstances as defense acknowledges, just as it is proper here. Such speculation is inapplicable here, as the sentencing court heard evidence pertaining to Marknsen's actions in regards to his financial crimes from the case at hand--indeed, Theotig made it clear at the restitution hearing that she had been careful to distinguish expenses incurred from counseling necessitated by Marknsen's actions arising from this case versus those costs arising from his actions from other incidents. She stated that while she had indeed undergone counseling due to Marknsen's actions in a separate case, it was "a different counseling than anything that I have submitted for this crime." Theotig went on to add: "I haven't been seeking counseling all of a sudden. I have been going to counseling since day one." 8/15/11 RP 19. Thus, the request for restitution for counseling expenses was carefully considered to cover only the counseling caused by Marknsen's actions in the case at hand and this carefully considered request formed the basis of the court's award for losses.

Marknsen also argues that the "Medical Restitution Estimate" does not provide a sufficient basis for restitution, as it

lists the charge as "Felony Violation of a No Contact Order" and a different cause number. But this appears to be no more than a scrivener's error. The incorrect charge and cause number are at the top of the page, in the informational section prepared by the King County Victim Assistance Unit. Under the section filled out by the victim, Theotig in this case, the information listed clearly relates to the case at hand. Section "C" lists "Mortgage Fraud/Monetary Theft" as a basis for restitution, and section "E" lists "attorney fees/Bankruptcy" as a basis for restitution. Appendix A. The costs listed under "attorney fees," "counseling bills," "prescriptions," and "insurance coverage" all correlate with the specific requests for restitution made in this case. During the restitution hearing, the issue of medical expenses was specifically addressed, and the State acknowledged reviewing the medical costs at the behest of the defense attorney and finding an error--a \$4 charge for an unrelated medication. 8/15/11 RP 3. Other than that, it was affirmed that the medical costs were for Theotig's medical and psychological issues. Id. Even if there are overlapping crimes that could form the basis for restitution, the evidence here demonstrates that the requests on the Estimate were causally related to the actions of Marknsen in the case at hand.

b. The Attorney Fees Incurred By Theotig Were Causally Related To Marknsen's Domestic Violence Financial Crimes.

Similarly, the imposition of restitution for attorney expenses was also appropriate. "Attorney fees and costs may constitute damages on which restitution may be based, depending on the circumstances." State v. Kinneman, 155 Wn.2d 272, 288, 119 P.3d 350, 358 (2005). As Marknsen acknowledges in his brief, Ms. Theotig hired an attorney "to obtain a couple different restraining orders or no-contact orders, as well as filing a civil suit to recover monies that had been stolen from me, and the credit card debt as well as the refinance debt..." 8/15/11 RP 8. Such expenses have a clear causal relationship with the underlying crimes. But for Marknsen's abuse and financial exploitation of Theotig, she would not have had to hire these attorneys to secure no-contact orders and help her sort through her financial difficulties.

Marknsen argues that hiring an attorney to seek a no-contact order "was obviously not for this case, because a no-contact order was already in place under this cause number." Appellant's Brief 10. But there is no legal principle that Marknsen cites in support of this argument. Theotig was specifically questioned by the court as to whether the no contact orders were for incidents

arising out of the current case, and she answered yes, and further stated that the legal counsel was solely for circumstances having to do with Marknsen. 8/15/11 RP 8. Marknsen's abuse and financial exploitation of Theotig was therefore causally related to her decision to seek out an additional no-contact order to prevent further abuse and exploitation. That there may have been a criminal no-contact order already in place does not prohibit her from seeking further assistance to see if she could secure better protection, particularly given that until the time of sentencing, the durability of any no-contact order is tenuous at best.

Moreover, the assistance with securing a no-contact order was but one portion of the legal services. During the restitution hearing, the court inquired of Theotig as to the precise nature of the legal assistance that she received in exchange for costs incurred for legal counsel, with the court noting that some checks submitted in the restitution packet were made out to the Fink Law Office and some were made out to Dallas Jolley. 8/15/11 RP 7. Theotig clarified that the checks to Dallas Jolley were for "bankruptcy filing, bankruptcy fees" arising from her ruined finances, as well as for credit card debt incurred because "Marknsen had opened up three credit cards in my name without my permission, and took them to

the highest balances, and I wasn't able to pay those." Id. These payments to Jolley amounted to \$2,520. App. A. The payments to the Fink Law Firm amounted to \$12,970. Id. These were to cover "restraining orders or no contact orders, as well as filing a civil suit to recover monies that he [Marknsen] had stolen from me, and the credit card debt as well as the refinance debt and a few other--he had stolen some money out of my checking account, like that."

8/15/11 RP 7-8. Because Marknsen pleaded guilty to obtaining a signature by deception or duress - domestic violence, which caused Theotig to lose her home, and because he pled guilty to theft in regards to stealing checks that were meant to pay off Theotig's credit cards and that further ruined her financially, there existed a causal relationship between his crimes and the legal counsel sought by Theotig. CP 24-26, 27-59, 60-63.

Theotig also indicated that she sought some legal advice in regards to Marknsen having also tampered with her 401(k) account, altering it so that he would be listed as the beneficiary. 8/15/11 RP 12. Marknsen now argues that this unrelated matter renders the restitution award invalid. However, that a very small portion of the legal costs may have been for an unrelated matter does not by itself render the restitution award invalid. "Restitution does not

need to be proven with specific accuracy. Evidence is sufficient if it affords a reasonable basis for estimating loss." State v. Dedonado, 99 Wn. App. at 256. The lack of precision and specificity as to what amount was spent on the 401(k) issue is therefore not a bar to the seeking restitution for legal expenses. More important is that here, upon questioning by defense counsel, Theotig stated that "the whole reason for me hiring her [Fink] was to regain monies that he stole from me, and hopefully keep my house over my head." 8/15/11 RP 11. Theotig's testimony therefore made clear that almost all of the legal expenses were for losses caused by Marknsen's actions in the case at hand, thereby providing a reasonable basis for estimating the loss.

c. The Court Found A Clear Causal Connection Between The Restitution Ordered And Marknsen's Crimes.

Marknsen was not simply Theotig's mortgage broker, but also her boyfriend at the time of his crimes. It was this domestic relationship, and the abuse that it entailed, that facilitated Marknsen's crimes and caused Theotig's professional, medical, and

legal difficulties. Theotig would not have suffered these losses but for Marknsen's abuse and exploitation of Theotig, and but for his theft of money obtained to pay off her credit cards. The court reviewed the evidence and the testimony and found a causal connection, ruling that "I do find that the restitution requested here is part of the things that were charged in this case." 8/15/11 RP 26. Financial crimes can often have direct consequences that go far beyond the original amount that is stolen/lost, and these consequences are still causally related to the original crime. State v. Wilson, 100 Wn. App. 44, 995 P.2d 1260 (2000) (defendant embezzled funds from travel agency, and restitution properly included costs of overtime, bookkeeping, accounting, and private detective and attorney services incurred by employer to ascertain the extent of embezzlement). The restitution awarded here was therefore an appropriate award and should be upheld.

2. THE COURT CONSIDERED THE FINANCIAL SITUATION OF THE DEFENDANT, RENDERING IMPOSITION OF ATTORNEY'S FEES APPROPRIATE.

Imposition of non-mandatory legal financial obligations, such as court costs and recoupment for appointed counsel, requires the

sentencing court to consider the defendant's financial resources:
"The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3). A court's determination as to a defendant's financial resources and ability to pay is "essentially factual and should be reviewed under the clearly erroneous standard." State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 1120 (1991). Formal findings are not required. Id. at 310.

An inquiry regarding a defendant's future ability to pay is necessarily speculative. Id. Thus, the record at sentencing must merely be sufficient to review whether the trial court considered the financial resources of the defendant, and the nature of the burden that would be imposed by the financial obligations. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. at 312). Here, Marknsen was ordered to

pay \$77,942.12 in recoupment for attorney fees. 8/15/11 RP 28-29; CP 5. During the sentencing hearing, Marknsen indicated that he was the owner of a business, and that he had 15 employees, and wondered why he was the only one being prosecuted. 2/18/11 RP 20-22. Theotig stated that she and her attorneys had determined that Marknsen had numerous assets including cars and houses, but that he had these assets in other people's names. 2/18/11 RP 10. Moreover, the crimes to which Marknsen pleaded guilty involved the theft of tens of thousands of dollars, to the benefit of Marknsen. CP 1-8, 27-59, 72-86. The court heard arguments in regards to the attorney's fees issue at both sentencing and at the restitution hearing. 2/18/11 RP 1-26; 8/15/11 RP 1-29. Thus, the court did consider Marknsen's financial situation, and had a factual basis to indicate that Marknsen had a present or future ability to pay. Though it did not issue formal findings, there is no requirement that it have done so. Baldwin, 63 Wn. App. at 310. The imposition of attorney's fees was therefore appropriate and should be upheld.

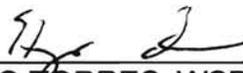
D. CONCLUSION

For the above reasons, the State respectfully requests that this court affirm the restitution award and affirm the imposition of attorney's fees.

DATED this 18 day of April, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

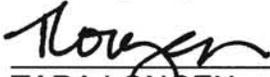
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Certificate of Service by Messenger

Today I served via ABC Legal Messengers a properly addressed envelope directed to Lila Silverstein, 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. MICHAEL MARKNSEN, Cause No. 67718-7-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.



TARA LONGEN

Done in Seattle, Washington

4.18.12

APRIL 18, 2012