

FILED
September 8, 2015
Court of Appeals
Division I
State of Washington

NO. 72847-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MELVIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Restitution 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 as a result of injury. Between March 11th and 12th, 2013, ten-month-old victim C.N.D.D. was treated at Seattle Children's Hospital after the discovery of bruises covering her body. CP 3. Did the trial court properly exercise its discretion by rejecting Melvin's argument that some of this treatment was for litigation purposes and ordering restitution for all medical costs resulting from treatment for injury?

B. STATEMENT OF THE CASE

Michael Melvin was charged by amended information in King County Superior Court with two counts of assault of a child in the second degree. CP 9-10. The State alleged that Melvin assaulted C.N.D.D. between February 20, 2013 and February 21, 2013 and between March 10, 2013 and March 11, 2013. CP 9-10. On March 11, 2013, following a skeletal survey at Seattle Children's Hospital, it was determined that C.N.D.D. had two healing fractured ribs and a fractured skull. CP 3, 35. A jury trial was held and a mistrial was declared on June 5, 2014. CP 61.

Melvin subsequently pled guilty to one count of assault of a child in the second degree. CP 20-42. Melvin was sentenced to 60 months. CP 11-18.

On November 18, 2014, the trial court timely ordered restitution in the total amount of \$2,254.10; \$866.94 to the victim's mother for out-of-pocket expenses related to treatment for injury and \$1,387.16 to the insurance provider, Delta Health Systems. CP 57-58. RP¹.

C. ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY GRANTING RESTITUTION FOR MEDICAL COSTS AS A RESULT OF INJURY.

Melvin argues that some of the medical treatment that C.N.N.D. received was for no other purpose than litigation and thus not recoverable. At Melvin's restitution hearing, the State presented medical bills for C.N.D.D.'s treatment between March 11th-12th, 2013 and on April 29, 2013, shortly after her injuries were discovered by Child Protective Services. The court acknowledged that if the costs were for trial testimony it would not be compensable but found that the dates of medical treatment did not

¹ The State will cite to the verbatim report of proceedings, which consists of a single volume dated November 18, 2014, as "RP."

support excluding treatment from the restitution order. The trial court properly exercised its discretion in ordering restitution.

A sentencing court's authority to order restitution is statutory. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). The statute, RCW 9.94A.753, which governs the application of a trial court's authority to order restitution, specifies that restitution "...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 as a result of injury."² Although restitution must be based on easily ascertainable damages, loss need not be established with specific accuracy. State v. Kisor, 82 Wn. App. 175, 182, 916 P.2d 978 (1996). The State is obligated to establish the amount of restitution by a preponderance of the evidence. State v. Dennis, 101 Wn. App. 223, 226, 6 P.3d 1173 (2000). A victim's injuries must be causally related to the defendant's crime. State v. Osborne, 140 Wn. App. 38, 42, 163 P.3d 799 (2007). A trial court's decision with regards to restitution is reviewed for abuse

² RCW 9.94A.753(3) states: "Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime."

of discretion. State v. Cosgaya-Alvarez, 172 Wn. App. 785, 795, 291 P.3d 939 (2013).

The trial court, having heard the trial testimony, was in the best position to assess whether the medical bills were indeed for costs of litigation. The State does not dispute that treating physicians testified at Melvin's trial, but the mere fact that they provided forensic evidence against Melvin does not negate the true and original purpose for their involvement, treatment of C.N.D.D.'s injuries in March and April of 2013. CP 47-52.

By analogy, ER 803(a)(4) allows statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations reasonably related to diagnosis or treatment as admissible evidence.³ State v. Sims, 77 Wn. App. 77, 236, 239, 890 P.2d 521 (1995), State v. Doerflinger, 170 Wn. App. 650, 664, 882 P.2d 199 (1994). Much like the statements of injury in Doerflinger, when viewed objectively, the purposes of medical treatment for C.N.N.D. were not to prepare facts for future litigation but to appropriately assess C.N.N.D.'s

³ ER 803(a)(4): "Statements for Purposes of Medical Diagnosis or Treatment: Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

injuries and provide proper care. Simply because said statements may later yield forensic value does not render it a "cost" of litigation.

Melvin misplaces his reliance on State v. Martinez, 78 Wn. App. 870, 875, 899 P.2d 1302 (1995). The costs of litigation in Martinez are clearly distinguishable from the facts of this case. In that case, the defendant was found guilty of arson after intentionally burning a building that was insured by Universal insurance company. Id. at 871. Following conviction, Universal was awarded restitution for expenses in hiring their own independent investigator, as well as attorney fees and costs incurred for defending a civil action brought by Martinez. Id. at 881. The Court of Appeals in Division II held that the costs incurred by the insurance company were not for property loss, damage, injury to persons, lost wages or counseling. Furthermore, the insurance company could not recover because it was not a "victim." Id. at 882. Clearly, the restitution Melvin now challenges was causally related to injury to the victim, C.N.D.D.

Furthermore, to accept Melvin's argument that medical treatment as a result of injury later resulting in forensic evidence and trial testimony is not recoverable as restitution would prevent any "victim" from recovering costs directly and causally related to

the defendant for injury suffered at the hands of their assailant and would thwart the very purpose for which RCW 9.94A.753 was intended.

Furthermore Melvin has not provided a transcript of the testimony of the witnesses at issue. There is nothing to support the assertion that the treating physicians for C.N.N.D. were only contacted for purposes of litigation and not as treating physicians as Melvin suggests.⁴

D. CONCLUSION

The trial court properly exercised its discretion in finding that the State had established by a preponderance of the evidence that restitution imposed was not for trial testimony or costs related to litigation, but for medical treatment of injuries caused by the defendant.

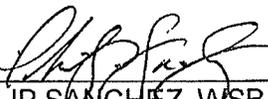
For the foregoing reasons above, the State respectfully asks this Court to affirm the trial court's timely order for restitution.

DATED this 8TH day of September, 2015.

⁴ RAP 9.2(b) states "Content. A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review...If the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Thomas M. Kummerow, containing a copy of the Respondent's Brief, in STATE V. MICHAEL MELVIN, Cause No. 72847-4-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.



Name
Done in [City], Washington

09-08-15

Date