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78070-1

NO. 78070-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ANDERSON,

Appellant.

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

The Honorable Cheryl B. Carey, Judge

BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering an order granting restitution.
2. The court erroneously ordered restitution for medical services without adequate evidence that all the services were causally connected to the incident as required by statute.
3. Appellant received ineffective assistance of counsel when his attorney failed to object to the restitution requested by the State.

Issues Pertaining to Assignments of Error

1. The trial court ordered appellant to pay \$87,437.15 in restitution for medical bills for services rendered to James Vaccaro several months after the incident. However, it was impossible from the trial testimony and submitted medical documentation to determine whether all the costs incurred related to appellant's crime. Therefore, the State failed to establish a causal connection between Vaccaro's injuries and appellant's crime of vehicular assault. Where the medical documentation submitted by the State to establish restitution fails to provide the required causal connection between the injury sustained and the crime committed, must the order setting restitution be vacated?

2. Did defense counsel provide ineffective assistance of counsel by failing to object to restitution which included medical expenses that lacked the required causal connection?

B. STATEMENT OF THE CASE

Based on an incident that occurred on October 25, 2014, appellant Nicholas Anderson was found guilty by a jury of four counts of vehicular homicide, and one count each of vehicular assault and reckless driving. James Vaccaro was injured in the crash, and the jury returned a special verdict finding that the injuries sustained in the vehicular assault substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm. CP 17-22, 155-65.

The supporting restitution documents offered by the State at the restitution hearing included: (1) receipts related to funeral and burial expenses associated with Andrew Tedford totaling \$9,591; (2) burial expenses totaling \$968.33 associated with Rehlein Stone; and (3) a four page itemized "claim summary" totaling \$87,437.15 for medical expenses associated with Vaccaro. CP 47-71. The prosecution did not present any witness testimony or any sworn statements at the restitution hearing. Anderson did not object to any of the claimed expenses.

The court imposed the full amount of restitution requested by the State, \$97,996.48. CP 72-73; RP¹ 28. Anderson timely appeals. CP 20-46, 74-75.

C. ARGUMENT

1. THE TRIAL COURT IMPERMISSIBLY IMPOSED RESTITUTION WITHOUT EVIDENCE OF A CAUSAL CONNECTION BETWEEN THE CLAIMED MEDICAL TREATMENT AMOUNT AND THE OFFENSE

The State's restitution documentation included a "claim summary" for \$87,437.15, for medical treatments pertaining to James Vaccaro between October 25, 2014 and June 13, 2016. CP 47-71. However, it is not possible from this documentation to determine whether all the costs incurred via various providers were related to Anderson's crime of vehicular assault. Thus, the State's presentence statement fails to provide the required causal relationship between the expenses and the crime committed. Accordingly, this court must vacate the restitution order.

The restitution statute provides, in pertinent part, that restitution:

[S]hall 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 due to mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling related to the offense.

¹ "1RP" refers to the consecutively paginated verbatim report of proceedings for September 18, 2017, December 12, 2017, and January 30, 2018 which have been filed under this appeal cause number.

RCW 9.94A.753(3).

The statute's ascertainable-damages requirement precludes restitution for speculative and intangible losses. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). Instead, to order restitution, the trial court must "find that a victim's injuries were causally connected to a defendant's crime." State v. Enstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999). "'A causal connection is not established simply because a victim or insurer submits proof of expenditures[.]'" State v. Dennis, 101 Wn. App. 223, 227, 6 P.3d 1173 (2000) (alteration in original) (quoting State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000) (per curiam)). "This is because it is often not possible to determine from such documentation whether all the costs incurred were related to the offender's crime." Dennis, 101 Wn. App. at 227. Thus, "a summary of medical treatment that 'does not indicate why medical services were provided[] fails to establish the required causal connection between the victim's medical expenses and the crime committed.'" Id. (alteration in original) (quoting State v. Bunner, 86 Wn. App. 158, 160, 936 P.2d 419 (1997)).

A court abuses its discretion when a restitution order is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. State v. Enstone, 137 Wn.2d 675, 679–80, 974 P.2d 828 (1999). It acts

beyond its sentencing authority when it imposes restitution that is not statutorily authorized or adequately proved based on reliable evidence. See Griffith, 164 Wn.2d at 965, 967; State v Moen, 129 Wn.2d 535, 545-46, 919 P.2d 69 (1996). Where the trial court improperly orders restitution, the amount awarded is outside the court's statutory authority and therefore may be challenged for the first time on appeal. State v. Fleming, 75 Wn. App. 270, 276 n.3, 877 P.2d 243 (1994) (citing RAP 2.5(a)(1)); State v. Paine, 69 Wn. App. 873, 882-84, 850 P.2d 1369, rev. denied, 122 Wn.2d 1024, 866 P.2d 39 (1993)). Compare State v. Danis, 64 Wn. App. 814, 822-23, 826 P.2d 1096 (suggesting that failure to object to the restitution amount before the trial court may prevent appellate review, however the court noted that in any event the record strongly supported the restitution award), rev. denied, 119 Wn.2d 1015, 833 P.2d 1389 (1992).

“When the defendant challenges the legal basis for an award of restitution, [courts] do not defer to the trial court.” State v. McCarthy, 178 Wn. App. 290, 296, 313 P.3d 1247 (2013). Rather, when the trial court’s authority to order restitution is at issue, “the reviewing court addresses the issue de novo.” Id.

Two cases are instructive. In Dennis, the defendant pled guilty to assaulting several police officers and the State sought restitution for medical expenses relating to two officers, Dornay and Libby. 101 Wn.

App. at 225. The supporting evidence the State presented was: (1) a letter from the prosecutor's Victim Assistance Unit saying both officers were treated at Northwest Hospital for their injuries and that Seattle Workers Compensation paid specific amounts for both officers' claims; (2) a letter from the workers' compensation office showing it paid Northwest Hospital the bill for Officer Dornay, noting the date of injury. Id. at 226.

The Dennis Court faulted the documents produced by the prosecution because they "do not indicate why medical services were provided to Officers Dornay and Libby." Id. at 227-28. The court found sufficient evidence for restitution for Dornay, because the letter from the Victim Assistance Unit and probable cause certification said the officers were treated at Northwest Hospital "for their injuries," and the workers compensation letter said Dornay's injury occurred on July 30, 1997, which was the date of the incident. Id.

But "the only evidence the State presented regarding Officer Libby indicated that Officer Libby was treated at Northwest Hospital for injuries on an unknown date, incurring \$180.94 in expenses. This evidence is not sufficient to establish a causal connection between Officer Libby's injuries and Dennis's assault." Id.

Similarly, in Bunnar the State offered an itemized list of medical treatment and counseling expenses the Department of Social and Health

Services (DSHS) paid on behalf of the victim of a sexual offense. 86 Wn. App. at 159. The sentencing court inferred that DSHS "would not have paid the medical bills if they were not related to Bunner's crimes," and ordered the restitution. Id. at 160. But this Court reversed because the bill summary "does not indicate why medical services were provided." Id. Therefore, it "fails to establish the required causal connection between the victim's medical expenses and the crime committed." Id.

Dennis and Bunnar dictate the result here. No testimony or doctor's notes were presented at the restitution hearing. Instead, the State merely presented the four page "claim summary" listing medical services rendered to Vaccaro between October 25, 2014 and June 13, 2016. CP 68-71. The "claim summary" is merely an itemized list of expenses, which this Court held was inadequate in Bunner, 86 Wn. App. at 160-61. This documentation provides little explanation about what the services were for and does not link the listed treatment by various medical providers to treatment for injuries sustained as a result of Anderson's crime.

While the "claim summary" references various "diagnosis codes", many of those codes relate to vague service descriptions, such as "cough" and "other and unspecified injury" to various body parts. CP 68-71. Moreover, the diagnosis codes show that the last service rendered

specifically for "motor vehicle traffic accident" occurred on November 27, 2014. *Id.*

The testimony elicited at trial similarly fails to establish the required causal connection that all of the costs incurred via various providers were related to Anderson's crime of vehicular assault. Four witnesses testified about Vaccaro's injuries sustained in the crash. None however, articulated the specific dates associated with that medical treatment, how much the treatment cost, or whether it was paid for, and by whom.

Vaccaro's brother, Jacob explained that Vaccaro was in a coma for approximately one month. 1RP² 1644-45. He also explained that because of the crash Vaccaro had suffered memory loss, cognitive issues, and personality changes. 1RP 1645-47. Jacob noted that Vaccaro had participated in physical and cognitive therapy since the crash, but provided no details as to the extent of the therapy, who provided that therapy, when it was specifically provided, or how much it cost. 1RP 1647-50.

Similarly, Vaccaro himself testified only that he remembered being in the hospital and being told that he was in a coma and suffered brain damage. 2RP 73-75. Vaccaro also provided no details as to the extent of his

² Anderson uses the same index to the citations to the record for "1RP and "2RP" found on page 4, note 2, of the opening brief filed in State v. Anderson, No. 76672-4-I. Anderson has filed a contemporaneous motion asking this Court to share the record in cause no. 76682-4-I with Anderson's appeal in this cause number.

medical treatment, who those treatment providers included, or what the cost of treatment was.

Emergency physician Lisa Cooper treated Vaccaro at Harborview Medical Center the morning of the incident. 2RP 390-93. While Cooper testified about the extent of Vaccaro's injuries in the hours after the crash, she offered no testimony about the cost of that care, or any follow up care that Vaccaro might have received. See 2RP 393-405.

Finally, Harborview rehabilitation medicine physician, Aaron Bunnell, testified about the two or three weeks he worked with Vaccaro beginning in December 2014. 2RP 1075-78, 1085-86. Bunnell described Vaccaro's brain injury and his work with Vaccaro in the area of speech, occupation, and physical therapy. Like Cooper, Bunnell testified about the extent of Vaccaro's injuries, but offered no evidence about the cost of that care. 2RP 1083-85. While Bunnell also suggested that he referred Vaccaro to additional outpatient therapy providers, there was no explanation as to who those providers were, whether their treatment of Vaccaro continued beyond "early" 2015, and what the treatment cost. 2RP 1085-86.

The State did not provide any doctor's notes about the treatment provided to Vaccaro. It likewise provided no specific evidence pertaining to any treatment provided to Vaccaro beyond January 2015. Moreover, the "claim summary" shows that additional services were delivered more

than one and a half years (1) after the incident; (2) after the last treatment given by Cooper and Bunnell; (3) and after the last "diagnostic code" identified as "motor vehicle traffic accident". Id. Due to the significant time gap, it is unduly speculative to surmise that all expenses listed on the "claim summary" were incurred due to Anderson's offense. Dennis, 101 Wn. App. at 227-28. The "claim summary" accordingly fails provide the required causal connection necessary to sustain an order of restitution.

In short, the evidence of damages—even if adequately tied to Vaccaro's injury—is not ““sufficient to afford a reasonable basis for estimating the loss”” and thus ““subject[s] the trier of fact to mere speculation or conjecture.”” State v. Tobin, 132 Wn. App. 161, 174, 130 P.3d 426 (2006) (emphasis omitted) (quoting State v. Awawdeh, 72 Wn. App. 373, 379, 864 P.2d 965 (1994)).

Without evidence that the "claim summary" was for medical services caused by the offense, the prosecution did not meet its burden of proof. The unproven medical expenses must be stricken from the restitution order. “[I]f the State fails to establish a causal connection between a defendant’s actions and the damages, this court must vacate the restitution order.” Dennis, 101 Wn. App. at 229. “The reason for this rule is that the State must not be given a further opportunity to carry its burden of proof after it fails to do so following a specific objection.” Id. The State

should not be given another chance to prove entitlement to restitution when its first attempt to do so failed. Because the State's medical documentation does not show the requisite causal connection between Vaccaro's treatment and Anderson's crime, this court must vacate the restitution order.

2. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE RESTITUTION WHICH LACKED THE REQUIRED CAUSAL CONNECTION AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL

As indicated above, the the State's medical documentation does not show the requisite causal connection between Vaccaro's treatment and Anderson's crime. Defense counsel's failure to object amounted to ineffective assistance of counsel. State v. Hassan, 184 Wn. App. 140, 336 P.3d 99 (2014).

The Sixth Amendment to the United States Constitution guarantees the assistance of counsel to criminal defendants. Its purpose is to ensure that the accused does not suffer an adverse judgment or lose the benefit of procedural protections because of the ignorance of the law. United States v. Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740 (3d Cir.1979). A defendant is guaranteed that he need not stand alone against the State at any "critical stage" of the proceedings. United States v. Wade, 388 U.S. 218, 224–27, 87 S. Ct. 1926, 1930–32, 18 L.Ed.2d 1149 (1967). It is also well-established that a defendant is entitled to counsel during the

sentencing phase of his or her case. As stated by the Supreme Court in Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977):

Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.

The setting of restitution is an integral part of sentencing. State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993). Anderson therefore had the right to effective assistance of counsel in setting restitution. Hassan, 184 Wn. App. at 152.

To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient, and (2) the deficient performance prejudiced the defendant. Hassan, 184 Wn. App. at 152. Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. Id. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have been different. Id.

The Court's decision in Hassan is on point. Hassan was convicted of unlawful issuance of a bank check. The charge arose after Hassan told his friend Tiffany Gilpin that he would loan her \$1,000.00 to help her

repair her car. Thereafter, Hassan gave Gilpin a \$2,400.00 check written on a closed account. He asked Gilpin to deposit the check in her account and then immediately withdraw \$1,400.00 to give to him because it was an easier way for him to get cash than at his bank. As Hassan requested, Gilpin deposited the check in her account, withdrew \$1,400.00 and gave it to Hassan. Hassan's check did not clear. Hassan, 184 Wn. App. at 144-45.

At the restitution hearing, Hassan's counsel objected to the state's request for \$2,400.00 in restitution to Gilpin, claiming only that Hassan had repaid \$400.00 to her. The court imposed the full amount. Id. at 145.

On appeal, Hassan claimed his attorney was ineffective because he failed to object to the \$1,000.00 of the restitution order that represented Hassan's loan to Gilpin. Division Two agreed:

Unless a defendant agrees to the restitution amount, the State must prove the losses by a preponderance of the evidence. State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). Here, the state proved that Gilpin suffered a loss of \$1,400. But there is nothing in the record supporting the trial court's conclusion that Gilpin suffered a loss relating to the \$1,000 she deposited in her account and did not pay to Hassan in cash. Gilpin admitted that this amount was a loan, not money that Hassan owed to her. And there is no evidence that Gilpin suffered any loss due to the \$1,000 loan she thought she was receiving not materializing. Therefore, the state failed to prove by a preponderance of the evidence that Gilpin incurred more than a \$1,000 loss.

Because there was no evidence to support a \$2,400 restitution award, counsel should have objected to that award. And there was no conceivable tactical reason not to object. Accordingly, defense counsel was deficient in this respect. Further, defense counsel's failure to object prejudiced Hassan because if counsel had pointed out the State's failure to sustain its burden of proving an additional \$1,000 loss, the trial court would have declined to include that amount in the restitution award. Accordingly, we hold that defense counsel's representation was ineffective regarding the restitution award.

Hassan, 184 Wn. App. at 152.

Defense counsel was similarly ineffective here. Because there was no causal connection between Vaccaro's medical treatment and Anderson's crime, there was no basis for the court to order the full \$87,437.15 in medical restitution. There was no conceivable tactical reason not to object to this amount. Defense counsel's failure to object prejudiced Anderson because the trial court would have declined to include that amount in the restitution award absent the State satisfying its burden of proof. Defense counsel's representation was deficient regarding the restitution award.

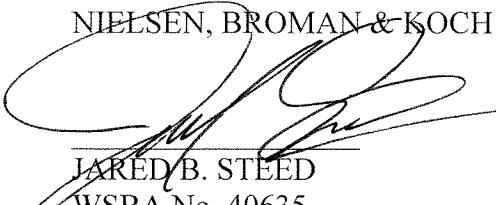
D. CONCLUSION

For the reasons discussed above, the medical documentation the State submitted fails to provide the required causal link between Vaccaro's injuries and treatment and Anderson's crime. Defense counsel was ineffective in failing to object to the restitution order on this basis. This court must vacate the restitution order in this case.

DATED this 29th day of May, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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