

STATE OF NORTH DAKOTA
COUNTY OF STUTSMAN

IN DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT

State of North Dakota)	
Plaintiff)	Restitution Summary
)	
v)	
)	
Matthew Alan Jasmann)	47-2013-CR-318
Defendant)	47-2013-CR-335

1. A restitution hearing was requested by the state over theft of wheels and medical expenses related to the GSI.
2. At the sentencing hearing held on the 18 August 2014, restitution for the wheels taken from Farmers' Union was brought up. The Defendant said on the record he'd paid to have the tires remounted and that he paid to have them put back on the victim's truck at the Defendant's cost. Jasmann was protesting that there is no restitution due for the wheels case and indicated in sum that was *all taken care of*.
3. Stutsman County Victim Advocate, Sue Lloyd was later informed that the wheels are still in evidence. Farmers' Union, General Manager, John Fritz, informed the State's Attorney that the General Manager would be satisfied if the wheels were released from evidence and he kept the \$500 the Defendant presumably gave for expenses of alignment and remounting. The General Manager explained Farmers Union bought new wheels for the truck because the truck was found wheelless up on blocks after the theft. He went on to say that the wheels that were stolen were in evidence and that the truck is still running on the replacement wheels Farmers' Union bought.
4. Defense attorney, Russell Myhre has indicated via an email thread culminating on the 24th of September 2014 that he has verbal assent from his client to the idea that if the \$500 is

left with Farmers' Union and the wheels released to Farmers Union then there is no restitution issue on that case.

5. Considering the in court statement of Jasmann that this was all taken care of, the further context and claims of that statement, and the verbal assent Mr. Myhre relayed, the State reasonably believes that there is a restitution agreement on the wheels.

6. Restitution associated with the GSI case and Alecia Willey is not settled. The State's position is that \$2,388.62 is due to the Willeys from Jasmann.

A.	\$278.08	lost wages
B.	\$1,167.91	un-reimbursed medical costs related to Avera
C.	296.79	un-reimbursed medical costs prescriptions
D.	\$645.84	costs not covered by Blue Cross Blue Shield
	\$2,388.62	Total

7. Redacted copies of billing paper work and ledgers have been provided to defense attorney Russ Myhre but due to the fact the case is over GSI, the victim suffers from PTSD due stemming from the GSI, and because even the redacted records contain information about her medical treatment, the records are not being filed with this submission.

8. Authority to order restitution was discussed recently in *State v. Tupa*, 205 ND 25, ¶4, 691 N.W.2d 579, 581.

Under N.D.C.C. § 12.1-32-08(1), courts have the authority to order a criminal defendant to pay restitution. Section 12.1-32-08(1), N.D.C.C., states, in part:

1. Before imposing restitution or reparation as a sentence or condition of probation, the court shall hold a hearing on the matter with notice to the prosecuting attorney and to the

defendant as to the nature and amount thereof. The court, when sentencing a person adjudged guilty of criminal activities that have resulted in pecuniary damages, in addition to any other sentence it may impose, shall order that the defendant make restitution to the victim or other recipient as determined by the court, unless the court states on the record, based upon the criteria in this subsection, the reason it does not order restitution or orders only partial restitution. In determining whether to order restitution, the court shall take into account:

- a. The reasonable damages sustained by the victim or victims of the criminal offense, which damages are limited to those directly related to the criminal offense and expenses actually incurred as a direct result of the defendant's criminal action.
- b. The ability of the defendant to restore the fruits of the criminal action or to pay monetary reparations, or to otherwise take action to restore the victim's property.
- c. The likelihood that attaching a condition relating to restitution or reparation will serve a valid rehabilitational purpose in the case of the particular offender considered.

Thus, under N.D.C.C. § 12.1-32-08(1), a restitution hearing is required to be held prior to imposing restitution as a sentence, and this provision is applicable “in situations where the defendant either is found guilty or pleaded guilty to a criminal charge and the amounts or the issues of restitution or reparation are uncertain or are in dispute.” *State v. Thorstad*, 261 N.W.2d 899, 901 (N.D.1978). This Court's review of a restitution order is limited to whether the district court acted within the limits set by statute, which is similar to an abuse of discretion standard. *State v. Bingaman*, 2002 ND 210, ¶ 4, 655 N.W.2d 57; *State v. Kensmoe*, 2001 ND 190, ¶ 7, 636 N.W.2d 183. A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law. *Bingaman*, at ¶ 4; *Kensmoe*, at ¶ 7. “[T]he State has the burden in a restitution hearing to prove the amount of restitution by a preponderance of the evidence.” *State v. Gill*, 2004 ND 137, ¶ 7, 681 N.W.2d 832.

State v. Tupa, 205 ND 25, ¶4, 691 N.W.2d 579, 581.

9. Although the State has the burden of proving the amount of restitution, the defendant has

the burden to raise and prove an inability to pay the restitution ordered. *State v. Moos*, 2008 ND 228, ¶30, 758 N.W.2d 674, 684-685.

10. Trial courts have a wide degree of discretion when determining restitution awards. *Tupa*, 2005 ND 25, ¶ 8, 691 N.W.2d 579. “Evidentiary imprecision on the amount of damages does not preclude recovery.” *Keller v. Bolding*, 2004 ND 80, ¶ 21, 678 N.W.2d 578. When the quantity of damages awarded “may be hard to prove, the amount of damages is to be left to the sound discretion of the finder of facts.” *B.W.S. Invs. v. Mid-Am Restaurants*, 459 N.W.2d 759, 764 (N.D. 1990). *State v. Gendron*, 2008 ND 70, ¶8,747 N.W.2d 125, 128.

LOST WAGES

11. A court may order restitution for lost wages when the lost wages resulted from the injuries caused by the defendant. *Koile v. State*, 902 So.2d 822, 825 (Fla. App. 5 Dist., 2005); Annotation, *Measure and Elements of Restitution to Which Victim is Entitled Under State Criminal Statute*, 15 ALR5th 391, 456; Annotation, *Propriety of Condition of Probation Which Requires Defendant Convicted of Crime of Violence to Make Reparation to Injured Victim*, 79 A.L.R.3d 976 at 994 (1977).
12. North Dakota’s statute dictates, “damages are limited to those directly related to the criminal offense and expenses actually incurred as a direct result of the defendant's criminal action.” NDCC 12.1-32-08. The strength of the casual nexus required under this statute has, to the State’s knowledge, not been explained in detail by the North Dakota Supreme court. See *State v. Phippen*, 496 N.W.2d 50 (N.D. 1993) (“there must exist an immediate causal connection between the criminal conduct and the damages or expenses for which restitution is ordered”). Other jurisdictions have discussed their

statute's causal requirement. For example in *State v. Danford*, the Washington Court of Appeals indicated Washington's statute required a "but for" nexus.

Restitution is appropriate for actual expenses incurred for treatment of injuries and lost wages resulting from injury. RCW 9.94A.753(3). The restitution amount must be based on easily ascertainable damages. *Id.* It must be supported by 'substantial credible evidence' such that the trial court has a reasonable basis for estimating loss and is not relegated to mere speculation or conjecture. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (quoting *State v. Fleming*, 75 Wn.App. 270, 274–75, 877 P.2d 243 (1994)). But, the amount need not be established with specific accuracy. *Id.* Restitution can only be ordered for losses that are causally connected to the crime such that, **but for** the charged crime, the victim would not have incurred the loss. *Id.* at 965–66. The State bears the burden to prove the victim's losses and the causal connection by a preponderance of the evidence. *Id.* at 965.

The State does not meet its burden by merely providing proof of expenditures. *Dedonado*, 99 Wn. App at 257. Nor does it establish a causal connection by submitting a list of medical charges and the amount paid by the Department of Social and Health Services. *Bunner*, 86 Wn. App at 160. It is likewise insufficient to provide documents that include only the service provider, service date, date paid, billed amount, and amount paid. *State v. Hahn*, 100 Wn.App. 391, 399–400, 996 P.2d 1125 (2000). In contrast, restitution is proper where the victim testifies at the restitution hearing to the connection between the injuries and the crime. *State v. Blanchfield*, 126 Wn.App. 235, 241–42, 108 P.3d 173 (2005). Further, restitution is proper to one victim where there is evidence of expenses accompanied by a letter that indicates the charges were incurred on the same day the crime occurred, but improper to another victim of the same crime where the medical expenses are not dated. *State v. Dennis*, 101 Wn.App. 223, 227–28, 6 P.3d 1173 (2000).

State v. Danford, 2011 WL 4012371, 3 (Wash. App. Div. 1, 2011).

13. Minnesota decided the "but for" test was too permissive and would allow too many losses to fall in the category of losses for which a defendant was liable.

We agree with Palubicki that the potential exists for a restitution claim to become so attenuated in its cause that it cannot be said to

result from the defendant's criminal act. For that reason, a but-for test has the potential to expand a restitution award beyond the statutory provision, and we decline to adopt such a broad test.

State v. Palubicki, 727 N.W.2d 662, 667 (Minn. 2007).

14. In 1997, Arizona published the following useful discussion of what constitutes “direct” damages as opposed to consequential loss. Like Minnesota, Arizona found the “but for” test too broad.

We next review the requirement that defendant pay the victim restitution for lost **1251 *198 wages for the time the victim spent in court. By statute, a trial court must impose restitution for economic loss as part of the defendant's sentence. A.R.S. § 13-603(C). “Economic loss” is defined by statute as follows: “Economic loss” means any loss incurred by a person as a result of the commission of an offense. Economic loss includes lost interest, *lost earnings*, and other losses which would not have been incurred but for the offense. Economic loss does not include losses incurred by the convicted person, damages for pain and suffering, punitive damages or consequential damages. A.R.S. § 13-105(14) (Supp.1996) (emphasis added).

The issue is whether wages lost due to voluntary attendance at trial are recoverable “lost earnings” on the one hand, or non-recoverable “consequential damages” on the other. We hold that this item is subject to restitution.

“The statute mandating recovery for economic loss is quite broad, and we have allowed restitution for a wide variety of expenses caused by the conduct of persons convicted of crimes.” *State v. Baltzell*, 175 Ariz. 437, 439, 857 P.2d 1291, 1293 (App.1992). The legislature identified lost earnings as among the losses for which the court may order restitution. We conclude that this encompasses not only wages lost due to an injury caused by the criminal conduct, and wages lost because of a trial appearance made mandatory by subpoena, but also the victim's voluntary attendance. We reach this conclusion by rejecting the proposition that the lost wages are “consequential damages” not eligible for restitution.

Recoverable economic losses are those that flow directly from or are a direct result of the crime committed. *State v. Morris*, 173 Ariz. 14, 17, 839 P.2d 434, 437 (App.1992). This contrasts with “consequential damages,” which are those that do not flow directly from the defendant's criminal activity. *Id.*

Consequential damages instead are produced by the concurrence of some other causal event. *See id.* (quoting 25 C.J.S. Damages § 2 at 617).

Although we previously said if a loss is a “foreseeable” loss it is not merely a consequential loss, and that loss which is the “natural consequence” of the crime is not consequential, *id.* at 17-18, 839 P.2d at 437-38, the proper focus is upon how directly the loss flows from the defendant's acts. And while we previously stated that the criminal conduct must be a “but for” cause, *id.* at 17, 839 P.2d at 437, such cause-in-fact is a necessary but not sufficient condition to restitution. A loss to which the defendant's act contributed can be either economic or consequential damage. Again, the distinguishing feature is how directly the loss flows from the crime.

In this case, the victim was required to attend some court proceedings by court order and voluntarily attended others. Defendant asks us to differentiate between wages lost for mandatory attendance and losses due to voluntary attendance.

Defendant finds some support in *State v. Wideman*, 165 Ariz. 364, 798 P.2d 1373 (App.1990). In that case, we held that travel expenses to attend court hearings were consequential losses not eligible for restitution. We reasoned that, because attendance had not been required, the travel expense was a matter of choice and “not directly related to the defendant's crime....” *Id.* at 369, 798 P.2d at 1378. On the other hand, we held that mental health counseling expenses were direct losses subject to restitution. *Id.*

After reflection, we find *Wideman* impossible to reconcile with the restitution statute and indeed with itself. We perceive no real difference between how directly the murder caused the **counseling expenses** and how directly it caused the travel expenses. *See id.* at 370, 798 P.2d at 1379 (Voss, J., dissenting.) The counseling expenses were no more and no less “a matter of choice” than the travel costs.

Moreover, lost wages are specifically mentioned in the restitution statute as restitution-eligible economic loss, whereas the travel expenses involved in *Wideman* are not. Accordingly, we decline to apply *Wideman* to deny restitution of the lost wages in this case.

What remains for us to resolve is whether lost wages for voluntary attendance at the **1252 *199 criminal trial proceedings flow directly from the crime. We think they do, and therefore hold these losses subject to restitution.

The fact that the victim was in court at all was a direct result of defendant's crime. She did not “to attend the hearings as a disinterested bystander might, but because she was the victim of

defendant's actions and, thus, unavoidably entwined in the criminal proceedings. But for defendant's criminal actions, the victim certainly would not have been present at the proceedings. It is a direct result of a crime that the victim attends the hearings and thus suffers wage loss. We believe it makes no difference whether the victim attended pursuant to subpoena or not.

To deny a victim the right to reimbursement for wages lost in attending court proceedings which he or she may attend by right would be tantamount in some instances to denying that individual the opportunity to exercise that right. Pursuant to the Victim's Bill of Rights, a victim has the right "[t]o be present at ... all criminal proceedings where the defendant has the right to be present." Ariz. Const. art. II, § 2.1(A)(3); Ariz. R.Crim. P. 39. "All criminal proceedings at which the defendant has the right to be present" means precisely that and includes both proceedings at which a victim's attendance is required by court mandate and those which the victim "chooses" to attend.

The victim's lost wages in attending court proceedings in this case were a direct result of defendant's actions. We affirm the trial court's order requiring defendant to reimburse the victim in the amount of \$140 for wages lost because of attendance at court hearings.

The trial court's order of restitution in the amount of \$65 for damages to the victim's wallet is affirmed. The order of restitution for lost wages in the amount of \$140 is also affirmed. The order of restitution in the amount of \$100 for the victim's lost bracelet and ring is vacated.

State v. Lindsley, 191 Ariz. 195, 198-199, 953 P.2d 1248, 1251 - 1252 (Ariz. App. Div. 1 1997).

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