IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHARLES PETER OSLAKOVIC, Appellant.	No. 41354-0-II UNPUBLISHED OPINION

Hunt, J. – Charles Peter Oslakovic appeals a $94,223.19 restitution order entered 11 months after his *Alford/Newton*[1] guilty plea convictions for driving under the influence (DUI) and failure to remain at the scene of an injury accident; the restitution was for injuries his passenger suffered when she exited Oslakovic's car while it was speeding along an interstate highway. He argues that the superior court erred in ordering restitution because (1) there was no proof that his passenger's injuries were causally related to his DUI conviction; and (2) when he entered his guilty pleas, the State did not inform him that it would seek restitution in any amount,

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (a defendant may plead guilty while disputing the facts alleged by the prosecution); *see also State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

in particular almost $100,000.[2] Agreeing that there was no proof of a causal relationship between Oslakovic's crime and his passenger's injuries, we vacate the restitution order and remand for correction of the judgment and sentence.

FACTS

I. The Incident

At about 10:30 pm on April 3, 2008, Charles Peter Oslakovic was driving south on Interstate-5 in Tacoma at 70 to 75 miles per hour when his passenger, Amy Roznowski, received an upsetting telephone call, climbed out of the moving SUV, and stood on its running board. Oslakovic, who was speeding, was not driving erratically or swerving; he rolled down the window to see what Roznowski was doing and to talk to her. But she either fell or jumped off the moving SUV, landed in the roadway, and suffered serious injuries. Oslakovic did not immediately slow, stop, or pull over his SUV; instead, he drove past one exit and took the next exit some distance away. Other drivers stopped and prevented traffic from running over Roznowski; witnesses reported the SUV to the state patrol.

A state trooper stopped Oslakovic's SUV after the next exit. Oslakovic told the trooper that (1) he was on his way back to the interstate to "see if [Roznowski] was ok"[3]; (2) he had been

[2] Because we vacate the restitution order for lack of causation, we do not reach this lack of notice issue. We note, however, that Oslakovic's statement on plea of guilty makes no mention of the State's intent to seek restitution for injuries causally related to his crimes; nor does it mention any amount. On the contrary, provision 6(e) of the statement mentions only generally that the court would order restitution"[*i*]*f this crime resulted in injury* to any person or damage to or loss of property." Clerk's Papers (CP) at 5 (emphasis added).

[3] CP at 39.

giving Roznowski a ride home from the airport when they had stopped for dinner, during which he had some drinks; (3) after they had resumed their journey, Roznowski received a call on her cellular telephone, "became upset with him," opened the SUV's door, and stepped out onto the running board; (4) he had "tried to pull over" and had "rolled down the window" to "see what [Roznowski] was doing" but she then disappeared from his view; (5) he had not taken the first exit because he did not have time; and (6) instead, he had taken the next exit and he was trying to turn around to return to the scene to check on Roznowski when the trooper stopped him. Clerk's Papers (CP) at 40. The trooper noticed that Oslakovic appeared as if he had been drinking; a later analysis revealed that his blood alcohol content was .09 per 100 ml of blood.

II. Procedure

The State charged Oslakovic with vehicular assault and failure to remain at an injury accident. Oslakovic brought a *Knapstad*[4] motion to dismiss the vehicular assault charge, arguing that his driving had not caused Roznowski's injuries. After reviewing Oslakovic's *Knapstad* motion, his counsel's supporting affidavit, the State's response, and Oslakovic's CrR 3.5 motion, the superior court attempted to "focus"[5] the parties on the *Knapstad* issue:

> Why don't we get right to the critical one, . . . from what I understand, if you look at it, again, most favorably in favor of the State, this young lady opens the door and gets out as she's going down the freeway as a passenger, with the defendant driving, and stands on the running board, and then she falls off. But, the only thing that he allegedly—the defendant could have done wrong is he was going between 70 and 80 miles an hour. And along there, the freeway, I think, is 60 miles an hour, the speed limit. . . . Then that gets us to, if that's—that's breaking the law. Is that a proximate cause, a legal cause, or even causation, proximate cause, which caused her to fall off?

[4] *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

[5] Verbatim Report of Proceedings (VRP) (Nov. 5, 2009) at 4.

Verbatim Report of Proceeding (VRP) (Nov. 5, 2009) at 5-6.

After hearing from counsel, the superior court further noted:

> There is no evidence he is swerving. There's no evidence he did anything with his brakes. That he didn't even slow down, is the argument that the State can make. There's no evidence he did anything to try to throw her off, or swerving and making some sort of maneuver that would cause her to fall off. The only thing that there is is she opens the door and shuts the door, hangs on to the luggage rack, and, in less than a mile, falls off and, tragically, is injured.

VRP (Nov. 5, 2009) at 21. Ultimately, the superior court dismissed the vehicular assault charge, stating:

> It just seems to me that going along at 70, 80 miles an hour and opening the door and getting on the running board and shutting the door and hanging on—and *there's no evidence that* [*Oslakovic*] *did anything except drive*, that I've been presented—I'm going to grant the motion to dismiss it as far as that aspect of it is concerned, that is, the vehicular assault.

VRP (Nov. 5, 2009) at 24 (emphasis added).

Later that same day, Oslakovic entered an *Alford*/*Newton* plea to the DUI and the failure-to-remain-at-the-scene-of-an-injury-accident charges. At the change of plea hearing, the superior court verified that Oslakovic had read the Statement of Defendant on Plea of Guilty (SDPG). The State's sentencing recommendation in the SDPG, however, did not mention that the State would seek restitution or set forth any proposed amount. Nor did the superior court or the State mention anything about requiring Oslakovic to pay restitution for Roznowski's injuries.

Eleven months later, the superior court held a restitution hearing. The State argued that it was seeking restitution "under the DUI prong," that the superior court's decision on the *Knapstad* motion was not dispositive as to restitution, and that the probable cause statement supported a

finding that there was a causal connection between Oslakovic's DUI and Roznowski's injuries. VRP (Oct. 15, 2010) at 3. Oslakovic argued that the superior court's decision on the *Knapstad* motion established that there was no causal connection between his driving and Roznowski's injuries. The superior court disagreed and found a causal connection: "I'm of the belief that there was a proximate cause connection between the DUI and [Oslakovic's] driving and, therefore, the injuries that occurred to the young lady." VRP (Oct. 15, 2010) at 6. The superior court then ordered Oslakovic to pay Roznowski $94,223.19 in restitution.

Oslakovic appeals this restitution order.[6]

ANALYSIS

Oslakovic argues that the superior court erred in concluding that there was a causal relationship between his DUI and Roznowski's injuries. We agree.

The decision to impose restitution is generally within the trial court's discretion, which we will not disturb unless it is manifestly unreasonable or based on untenable grounds. *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). Nevertheless, a trial court's authority to order restitution is limited to losses that are causally related to crimes charged and proven; a trial court cannot order restitution based on behavior that was not part of the charge for which the defendant was convicted. *State v. Woods*, 90 Wn. App. 904, 907, 953 P.2d 834, *review denied*, 136 Wn.2d 1021 (1998); *State v. Johnson*, 69 Wn. App. 189, 191, 847 P.2d 960 (1993). To prove that a crime caused the victim's loss for restitution purposes, the State must establish by a

[6] We previously affirmed Oslakovic's consecutive sentences in an unpublished opinion. *See State v. Oslakovic*, noted at 159 Wn. App. 1014, No. 40174-6-II, 2011 WL 61625.

preponderance of the evidence that the loss would not have occurred "but for" the specific crime charged. *State v. Thomas*, 138 Wn. App. 78, 82, 155 P.3d 998 (2007). The State failed in its proof here.

When Oslakovic entered his *Alford/Newton* plea, he agreed the superior court could rely on the State's statement of probable cause. This probable cause statement established that (1) Oslakovic had been drinking before the incident; (2) after the incident, his blood alcohol level was 0.90; (3) he did not appear to have slowed down immediately after Roznowski climbed out of his moving SUV and clung to the luggage rack as the car sped down the interstate highway; and (4) his initial response had been to open the window to see what Roznowski "was doing," while continuing to drive at 70 to 75 mph for one-quarter to one-half a mile before exiting the interstate and returning to her.[7] CP at 40.

Oslakovic's blood alcohol content of .09 per 100 ml of blood rendered him guilty of DUI by definition under RCW 46.61.502(1)(a). This statutory blood-alcohol content merely satisfied one element of the crime of DUI, namely that Oslakovic was guilty of driving under the influence of alcohol. This statutory presumption did not, however, also create a presumption that any possible impairment was the "but for" cause of Roznowski's injuries. Rather, as we have already noted, the State had to prove such causation in order to obtain restitution, and it failed to do so.

The State presented no evidence that (1) Oslakovic's intoxication had affected his driving

[7] We do not consider Oslakovic's actions after Roznowski jumped or fell from the SUV because the State did not seek restitution based on his failure-to-remain-at-the-scene conviction.

at the time of the incident or had contributed causally to Roznowski's injuries; (2) Oslakovic's drinking or driving had caused Roznowski to exit his speeding SUV; (3) Oslakovic's drinking or driving had caused Roznowski to lose her grip on the SUV's luggage rack or to jump or to fall off the running board; or (4) Oslakovic's failure to react to Roznowski's behavior differently, because of his intoxication, had caused Roznowski to fall or to suffer greater injury than she otherwise would have had he not been intoxicated. Thus, there was no evidence establishing that Oslakovic's DUI caused or increased the injuries that Roznowski suffered when she of her own volition exited his moving vehicle. Accordingly, we hold that the trial court erred in ordering restitution on this basis, reverse the restitution order, and remand to delete restitution from the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

I concur:

Johanson, A.C.J.

Penoyar, J. — I respectfully dissent. There was sufficient evidence to support the trial court's conclusion that, absent his intoxication, Oslakovic would not have (1) seen Roznowski climb out of the car and continued driving 70 mph for 15 to 30 seconds, at least one-quarter a mile; (2) failed when he "tried to pull over;" and (3) in his only response to the emergency, leaned all the way across the vehicle to roll down the window to see what Roznowski "was doing." CP at 39-40. Obviously, if Oslakovic had promptly, but carefully, slowed his vehicle, it is quite possible that Roznowski would still have been on the running board when the vehicle stopped. *See Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 111 P.3d 866 (2005) ("The 'but for' test requires a party to establish that the act or omission complained of probably caused the subsequent injury."). Thus, there was sufficient evidence for the trial court to conclude that but for Oslakovic's intoxication, it is more likely than not that Roznowski's injuries would not have occurred. *See Hetzel v. Parks*, 93 Wn. App. 929, 971 P.2d 115 (1999) ("Cause in fact is generally for the trier of fact to decide.").

Penoyar, J.