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SUMMARY
April 29, 2021

2021COA57

**No. 19CA0459, People v. Dyson — Criminal Law — Sentencing
— Restitution**

A division of the court of appeals considers whether a district court may award restitution to a victim of an assault for the costs of facial and neck treatments (1) that Medicaid deemed were cosmetic in nature and (2) for which the People presented no expert evidence of medical necessity. The division upholds the award of restitution because the record supports the district court’s determination that the victim’s expenses for the treatments were proximately caused by the defendant’s conduct: the victim underwent the treatments just “trying to get her face . . . and neck back to what [they] looked like . . . prior to the assault.”

Court of Appeals No. 19CA0459
Adams County District Court No. 16CR4195
Honorable Sharon D. Holbrook, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Anthony Douglas Dyson,

Defendant-Appellant.

ORDER AFFIRMED IN PART, VACATED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division A
Opinion by JUDGE DAILEY
Román and Navarro, JJ., concur

Announced April 29, 2021

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¶ 1 Defendant, Anthony Douglas Dyson, appeals the trial court’s order requiring him to pay \$8,999 in restitution to the victim. We affirm in part, vacate in part, and remand with directions.

I. Background

¶ 2 Dyson pleaded guilty to attempted first degree (after deliberation) murder in exchange for a stipulated sentence of thirty-five years’ imprisonment in the custody of the Department of Corrections. He had attacked his ex-wife, B.D., fracturing her cervical spine and skull in such a manner as to leave skull fragments lodged in her brain. Further, as B.D. was being admitted to the hospital, she suffered a stroke. She spent a month on a respirator in an induced coma, underwent seven surgeries, and spent months at a rehabilitation facility.

¶ 3 Following her release from the rehabilitation facility, B.D. received, from a spa called Ageless Aesthetics, three procedures related to her face and neck. These procedures encompassed two injections of Kybella (deoxycholic acid) and an injection of Juvederm (hyaluronic acid).

¶ 4 B.D.’s insurer — Medicaid — declined to pay for these procedures because they were deemed to be cosmetic in nature.

Indeed, Ageless Aesthetics offers (1) Kybella injections to dissolve age-related accumulated dietary fat from the chin and (2) Juvederm to fill the lines around the mouth and in some instances to add volume to thin and aging skin.

¶ 5 B.D. sought restitution for the cost of the procedures.

¶ 6 Upon Dyson’s objection, the trial court instructed the prosecution to obtain a doctor’s certification that the Ageless Aesthetics procedures were medically necessary and not merely elective cosmetic treatments. Neither the prosecution nor B.D., however, produced such a certification.

¶ 7 Instead, B.D. produced a letter from an administrator at Ageless Aesthetics that said, in pertinent part:

The following treatment has been suggested for patient [B.D.].

Kybella (Deoxycholic acid) injections in a series of 2 treatments. This treatment is part of the facial reconstructive process that [B.D.] has been undergoing, since March 2017. Patient is also undergoing dermal filler treatment (hyaluronic acid) to reconstruct volume loss in face and jawline.¹

¹ When asked why she hadn’t gotten a letter from a doctor, B.D. answered, “I assumed this was enough information because it has

¶ 8 The trial court awarded B.D. \$8,999 in restitution for the three Ageless Aesthetics procedures and a membership for part of a year to a fitness club.² In its oral ruling, the court noted that

[a]t the last hearing, the Court did indicate that the best evidence would be to have the information from a doctor. However, . . . [t]here is no case law that indicates that the victim cannot testify to her own medical conditions that this Court has been able to find nor does it require an expert to come in and testify to those issues

So long as the Court finds the witness to be credible, the Court can rely on that as well as the exhibits that have been offered.

The Court does find [B.D.] to be a credible witness

¶ 9 With respect to the Ageless Aesthetics procedures, specifically, the court found:

[B.D.] indicated that when she was at University Hospital, she spoke with four

my name on it. It says facial reconstruction. There's dates. I don't know. I assumed this was enough." She also said that her doctor had recommended treatment by Ageless Aesthetics and "would tell anybody that called him," since she had signed a release under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d to 1320d-9.

² Dyson does not challenge the \$273 portion of the restitution award relating to B.D.'s partial gym membership for physical rehabilitation purposes.

doctors who said she would need additional treatment on her neck and scalp.

Specifically, Dr. Witt told her that that area would stay loose and she'd have to work on that

[B.D.] also indicated that her discussions around the issues with her face were mostly based on the fact that her stroke caused the left side of her face to be not oriented correctly

[The] letter from Ageless Aesthetics indicated the following treatment has been suggested for patient [B.D.]. It refers to . . . [a] facial reconstructive process that [B.D.] has been undergoing That letter also indicates if [the] patient is undergoing dermal filler treatment to reconstruct volume loss in her face and jaw line.

While on the stand, the victim . . . testified that after the assault, her face did not look the same.

. . . .

There's no testimony [B.D.] was doing this in order to look younger or for any reason other than trying to get her face back to what it looked like and her neck to what it looked like to the best of her ability prior to the assault.

¶ 10 On appeal, Dyson contends that (1) the prosecution presented insufficient evidence to support the award of restitution to B.D. for the procedures performed by Ageless Aesthetics; and, alternatively,

(2) the court awarded B.D. an erroneous amount of restitution for those treatments.³ As will be seen below, we disagree with Dyson’s first contention but agree with his second one.

*II. Dyson’s Responsibility to Pay
for the Ageless Aesthetics Procedures*

¶ 11 Dyson contends that the evidence was insufficient to show that his conduct was the proximate cause of the victim’s need for the Kybella and Juvederm procedures. We are not persuaded.

¶ 12 The goal of the restitution statute is to make victims whole for the harms suffered as the result of a defendant’s criminal conduct. *People v. Perez*, 2017 COA 52, ¶ 13. Consequently, a victim has a right to restitution for “any pecuniary loss suffered by a victim . . . [that is] proximately caused by an offender’s conduct” § 18-1.3-602(3)(a), C.R.S. 2020. “[T]he prosecution bears the burden of proving by a preponderance of the evidence not only the victim’s losses, but also that the victim’s losses were proximately caused by

³ The trial court also ordered Dyson to pay \$163,152.58 in restitution to Medicaid and \$3,712.80 in restitution to the Crime Victim Compensation Board. These awards are not at issue on appeal.

the defendant's criminal conduct." *People v. Martinez-Chavez*, 2020 COA 39, ¶ 14.

¶ 13 "Proximate cause in the context of restitution is defined as a cause which in natural and probable sequence produced the claimed injury and without which the claimed injury would not have been sustained." *People v. Rice*, 2020 COA 143, ¶ 24 (citing *People v. Rivera*, 250 P.3d 1272, 1274 (Colo. App. 2010)). Thus, a court should not order a defendant to pay restitution for losses that "did not stem from the conduct that was the basis of the defendant's conviction." *Rivera*, 250 P.3d at 1274.

¶ 14 "More than speculation is required for a defendant to bear responsibility for a victim's loss[,] [b]ut the prosecution is not required to prove restitution by the same quality of evidence required in a trial on the merits of the case." *People in Interest of A.V.*, 2018 COA 138M, ¶ 24 (citations omitted). The preponderance of evidence standard only requires proof that "the existence of a contested fact is 'more probable than its nonexistence.'" *People v. Taylor*, 618 P.2d 1127, 1135 (Colo. 1980) (quoting *Page v. Clark*, 197 Colo. 306, 318, 592 P.2d 792, 800 (1979)).

¶ 15 Whether there was sufficient evidence to support a restitution award is a matter we review de novo. *People v. Stone*, 2020 COA 24, ¶ 7. In undertaking such review, we ask “whether the evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, establishes by a preponderance of the evidence that the defendant caused that amount of loss.” *Id.* (quoting *People v. Barbre*, 2018 COA 123, ¶ 25). “[W]e draw every inference fairly deducible from the evidence in favor of the court’s decision,” and “[w]e will not disturb a district court’s findings and conclusions if the record supports them, even though reasonable people might arrive at different conclusions based on the same facts.” *People in Interest of S.G.L.*, 214 P.3d 580, 583 (Colo. App. 2009) (analyzing sufficiency of evidence to sustain a dependency and neglect adjudication under a preponderance of evidence standard).

¶ 16 On appeal, Dyson asserts the following:

- The Ageless Aesthetics procedures “were purely cosmetic and not medically necessary.”

- “They were designed to counter the natural effects of aging and wholly unrelated to [B.D.’s] skull fracture and stroke.”
- “There was no medical proof that [B.D.’s] coma caused a swollen neck,” or that “Kybella is a medically appropriate treatment for medical swelling.”
- “The advertised and proven purpose of Kybella — to dissolve chin fat — bears no resemblance to B.D.’s desired outcome — to eliminate excess skin.”
- The need for the Juvederm injection to B.D.’s mouth and jawline was not caused by Dyson’s assault either: B.D.’s claim that her smile was crooked from facial nerve damage sustained as a result of her stroke was fatally undermined by the lack of reference to such damage in B.D.’s medical records.

¶ 17 We are not persuaded.

¶ 18 Initially, we note that like the trial court, we are unaware of any Colorado authority requiring that a request for restitution be supported by expert testimony to the effect that a service affecting one’s appearance was medically necessary.

¶ 19 We are, however, aware of opinions from elsewhere rejecting the requirement Dyson would have us impose. *See, e.g., In re Doe*, 192 P.3d 1101, 1109 (Idaho 2008) (concluding it was error to require “testimony or evidence beyond that of the victim and his medical bills to establish a *prima facie* case of the necessity and reasonableness” of the request for restitution); *State v. Nebrensky*, No. 44937, 2018 WL 1885680, at *5 (Idaho Ct. App. Apr. 20, 2018) (unpublished opinion) (“The State presented substantial and competent evidence to establish actual and proximate cause for the victim’s medical expenses. The victim proved, beyond a preponderance of the evidence, that every item requested for reimbursement is related to the abuse the victim suffered from Nebrensky. *Contrary to Nebrensky’s argument, expert testimony is not necessary to prove the requisite causal connection.*”) (emphasis added); *State v. Phillips*, 77 P.3d 1009, 2003 WL 22176026, at *1 (Kan. Ct. App. Sept. 19, 2003) (unpublished table decision) (not requiring medical testimony to find causation between the defendant’s crimes of attempted aggravated indecent liberties and the victim’s chiropractic treatment); *Martel v. State*, No. A14-2156, 2015 WL 4171887, at *1–4 (Minn. Ct. App. July 13, 2015)

(unpublished opinion) (“Minnesota courts have permitted restitution for damages suffered by victims in a wide variety of situations, including awards for expenses beyond strictly necessary medical expenses.”); *State v. Ramirez*, 825 N.W.2d 801, 807 (Neb. 2013) (concluding proximate cause was established for restitution based on victim’s testimony that defendant punched victim in the face, which resulted in a broken jaw, and victim incurred medical expenses and lost income, which victim corroborated with copies of his medical bills); *State v. Street*, 945 N.W.2d 450, 459 (Neb. 2020) (“[O]ther jurisdictions have rejected the contention that for the amount of the victim’s medical expenses to be ordered as restitution, the State must demonstrate the services were medically necessary . . .”).

¶ 20 We construe the restitution statute liberally to accomplish the purpose of making crime victims whole for the harms they suffered because of particular defendants’ criminal conduct. *People v. McCarthy*, 2012 COA 133, ¶ 7. Consequently,

a victim is entitled to be paid for medical services necessary to return her to the physical appearance she had before the crime, including, for example, cosmetic surgery, and in this case, cosmetic dental work. This is the

only reasonable interpretation of the statute in light of its purpose “to make the victim of a crime whole again — to the extent it is possible to do so.” *L.O. v. State*, 718 So. 2d 155, 157 (Fla. 1998). To hold otherwise would condemn the victim to be reminded of the assault every time she looked in the mirror, a result that cannot be reconciled with either the letter or the spirit of the Restitution Statute.

Nicholas v. State, 221 So. 3d 625, 2016 WL 7403574, at *2 (Fla. Dist. Ct. App. Dec. 21, 2016) (Logue, J., concurring) (unpublished table decision).

In the present case, the record shows the following:

- B.D. testified that she didn’t “look anything like what [she] used to look like.”
- She said that “what’s happened to me in the last year and coming out of a coma and having to recuperate, that’s a lot and it’s taken a tole [sic] on my body.”
- She suffered a fractured skull and a stroke as a result of Dyson’s assault on her.
- She testified that as a result of the stroke, she had “some nerve damage on [her] face” and “couldn’t smile properly.”

- She testified that she was told Kybella is “an acid that will decrease anything that has come from not being able to move [her] face properly.”
- The letter from the Ageless Aesthetics administrator recounted that B.D. was receiving Juvederm “to reconstruct volume loss in [the] face and jawline.”
- Due to the assault, B.D. had to be put into a drug-induced coma for over a month, during which time she underwent various surgeries.
- A metal mesh had to be constructed to cover a missing part of B.D.’s skull, and tissue had to be taken from B.D.’s leg and neck⁴ to create a “flap” to cover the mesh.
- She testified that Kybella was also used to help with the muscle loss in her neck: “It’s to help the neck to reduce all of the extra skin because of the injuries.”

⁴ B.D. was scarred in two places on her neck. The court noted, for the record, “a visible red and raised scar that extends from the back of her right ear about four inches down towards her collarbone and then another scar that is about two inches further on her neck closer to the midline of her face that is about three inches in diameter.”

¶ 21 We conclude that B.D.’s testimony was sufficient to sustain the court’s finding that Dyson’s conduct proximately caused B.D.’s expenses for the Ageless Aesthetics procedures. The fact that B.D.’s medical records may not have given certain details, or that an expert did not testify, affected only the weight, and not the sufficiency, of her testimony. *Cf. A.V.*, ¶ 29 (“As the fact finder, the court had the authority to determine the weight of the evidence [and] the witnesses’ credibility . . .”).

¶ 22 In so concluding, we necessarily reject, as misplaced, Dyson’s reliance on cases indicating that restitution is not awardable to compensate a victim’s attempt to find peace of mind or a sense of personal security, *see People v. Trujillo*, 75 P.3d 1133 (Colo. App. 2003), or to compensate a victim for a pre-existing vulnerability or insecurity, *see People v. Reyes*, 166 P.3d 301 (Colo. App. 2007). As the People point out, unlike the victims in those cases, B.D. did not undergo the Ageless Aesthetics treatments for “an amorphous confidence boost” or sense of security but to restore something tangible — her appearance — “as much as possible to what it had been before [Dyson’s] attack.”

III. Amount of Award

¶ 23 Dyson contends, the People concede, and we agree that the amount of restitution awarded to B.D. was erroneously inclusive or duplicative of various expenses. The proper calculation of restitution due to B.D. is:

\$ 2,400 for the two Kybella treatments
+ \$ 600 for the Juvederm treatment
+ \$ 273 for the partial gym membership
\$ 3,273 total

¶ 24 On remand, the trial court must correct the mittimus and minute orders to reflect the proper amount of restitution due to B.D.

IV. Disposition

¶ 25 The order is affirmed in part and vacated in part, and the matter is remanded to the trial court with directions to correct the amount of restitution due directly to B.D. to a figure of \$3,273.

JUDGE ROMÁN and JUDGE NAVARRO concur.