

FILED: November 26, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

EMA RAMOS,
Defendant-Appellant.

Washington County Circuit Court
C092342CR

A150423

Kirsten E. Thompson, Judge.

Submitted on December 18, 2013.

Peter Gartlan, Chief Defender, and Morgen E. Daniels, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Doug M. Petrina, Senior Assistant Attorney General, filed the brief for respondent.

Before Sercombe, Presiding Judge, and Hadlock, Judge, and Tookey, Judge.

SERCOMBE, P. J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
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1 SERCOMBE, P. J.

2 Defendant set fires in her restaurant and made an insurance claim for the
3 resulting damage to restaurant equipment. She was subsequently convicted of arson, in
4 connection with setting the fires, and attempted aggravated theft, in connection with the
5 fraudulent insurance claim. On appeal, she challenges only the restitution that the trial
6 court ordered her to pay. First, she contends that any award of restitution violated either
7 the Sixth Amendment to the United States Constitution or Article I, section 17, of the
8 Oregon Constitution. The parties agree, as do we, that those arguments were not
9 preserved, and we conclude that the purported error is not plain. Accordingly, we do not
10 reach the merits of defendant's constitutional arguments. Alternatively, she challenges
11 the restitution that she was ordered to pay to her insurance company, Oregon Mutual
12 Insurance Group (Oregon Mutual). Defendant contends that some of that restitution was
13 improperly ordered under ORS 137.106, the statute authorizing restitution in criminal
14 cases. As to that assignment of error, we conclude that the challenged expenses were
15 appropriate subjects of restitution. Accordingly, we affirm.

16 The facts related to this appeal are undisputed. After defendant was found
17 guilty, the state sought restitution awards to Shalimar Properties (defendant's landlord),
18 State Farm Insurance (the landlord's insurer of the premises), and Oregon Mutual
19 (defendant's insurer of the contents of the premises). The state and defendant stipulated
20 to \$42,532.32 in restitution to Shalimar Properties and State Farm Insurance, and the trial
21 court ordered that restitution. The state also sought restitution of \$28,417.98 to Oregon

1 Mutual.¹ The state provided evidence that Oregon Mutual had paid various sums totaling
2 that amount to a law firm, a forensics company, two investigators, and a court reporting
3 company in connection with its investigation and processing of defendant's claim, and to
4 assist it in cooperating with the state's investigation of the fires and prosecution of
5 defendant. Defendant disputed the propriety of some parts of that restitution, but, after a
6 hearing, the trial court ordered that defendant pay Oregon Mutual the full amount.

7 In her first assignment of error, defendant argues that the trial court erred in
8 ordering any restitution because--under either the Sixth Amendment or Article I, section
9 17--a restitution award must be based on jury findings or a valid jury waiver, neither of
10 which occurred in this case. The parties agree--as do we--that defendant did not raise that
11 issue below, but defendant asks us to review it as error apparent on the record.

12 Generally, we will not consider an unpreserved issue on appeal. *State v.*
13 *Wyatt*, 331 Or 335, 341, 15 P3d 22 (2000). Nonetheless, we may review an unpreserved
14 assignment of error as one "apparent on the record" under ORAP 5.45(1)--also known as
15 "plain error"--if certain conditions are met: (1) the error is one of law; (2) the error is
16 "apparent," in that the "legal point is obvious, not reasonably in dispute"; and (3) the error
17 appears on the record, such that we need not go outside the record or choose between

¹ At the restitution hearing, the state indicated that the amount of potential restitution to Oregon Mutual that had been discussed at trial was about \$28,000, but "that's been updated since then to \$34,135.52." However, the only evidence in the record is of requested restitution to Oregon Mutual of \$28,417.98. *See* ORS 137.106(1)(a) (district attorney shall present to the court evidence of the nature and amount sought in restitution).

1 competing inferences to find it, and the facts constituting the error are irrefutable. *State*
2 *v. Brown*, 310 Or 347, 355, 800 P2d 259 (1990). Even when those conditions are
3 satisfied, we must determine whether to exercise our discretion to consider the error and,
4 if we choose to consider it, articulate our reasons for doing so. *Ailes v. Portland*
5 *Meadows, Inc.*, 312 Or 376, 382, 823 P2d 956 (1991). For the reasons below, the legal
6 points that defendant raises are not "obvious" and, accordingly, not appropriate subjects
7 for plain error review.

8 Defendant first argues that the Sixth Amendment, as construed in *Apprendi*
9 *v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000), and *Blakely v.*
10 *Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2003), requires that a jury
11 must find the facts that provide the basis for restitution, unless the defendant waived the
12 right to a jury determination. In *Apprendi*, the United States Supreme Court held that
13 "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime
14 beyond the prescribed statutory maximum must be submitted to a jury, and proved
15 beyond a reasonable doubt." 530 US at 490. Four years later, in *Blakely*, the Court
16 illuminated what it meant when it referred to a "prescribed statutory maximum" sentence.
17 It is, the Court explained, the

18 "maximum sentence a judge may impose *solely on the basis of the facts*
19 *reflected in the jury verdict or admitted by the defendant.* * * * In other
20 words, the relevant 'statutory maximum' is not the maximum sentence a
21 judge may impose after finding additional facts, but the maximum [the
22 judge] may impose *without* any additional findings."

23 542 US at 303-04 (emphasis in original).

1 Defendant concedes that, at the time the trial court imposed restitution, we
2 had held that, even if *Apprendi* and *Blakely* applied to restitution, the imposition of
3 restitution under ORS 137.106 did not run afoul of the principles announced in those
4 cases. *State v. McMillan (A112613)*, 199 Or App 398, 403, 111 P3d 1136 (2005). In
5 *McMillan*, we explained that the facts necessary to impose restitution under ORS 137.106
6 are not facts that increase the penalty to which a defendant is subject beyond the statutory
7 maximum, because the statutory maximum includes restitution for the full amount of the
8 victim's pecuniary damages.² *Id.*; see also *State v. Webster*, 220 Or App 531, 535, 188
9 P3d 329, *rev den*, 345 Or 318 (2008) (applying reasoning of *McMillan* to restitution
10 under ORS 811.706, which permits the imposition of restitution for automobile accident-
11 related damages; statutory maximum sentence encompasses amount of damages caused
12 by the person as a result of the incident that gave rise to the charges for which the
13 defendant was convicted); *State v. Travalini*, 215 Or App 226, 234, 168 P3d 1159 (2007),
14 *rev den*, 344 Or 110 (2008) (rejecting argument that trial court ran afoul of the Sixth
15 Amendment by imposing restitution without having submitted the finding of facts
16 underlying restitution to the jury; declining to overrule *McMillan*); *State v. Mendez*, 211
17 Or App 311, 314, 155 P3d 54, *rev den*, 343 Or 160 (2007) (rejecting argument that, under
18 *Apprendi*, the determination of the amount of the victim's "economic damages" for
19 purposes of restitution should have been submitted to the jury); *State v. Black*, 208 Or

² The 2005 Legislative Assembly amended ORS 137.106 to change the word "pecuniary" to "economic." Or Laws 2005, ch 564, § 2.

1 App 719, 721 n 1, 145 P3d 367 (2006) (same).

2 Defendant contends, however, that the holding of *McMillan* was erroneous
3 under *Southern Union Co. v. U.S.*, 567 US ___, 132 S Ct 2344, 183 L Ed 2d 318 (2012).³
4 In *Southern Union Co.*, the defendant, a natural gas distributor, had been charged with,
5 *inter alia*, storing mercury without a permit "on or about September 19, 2002 until on or
6 about October 19, 2004," in violation of the Resource Conservation and Recovery Act of
7 1976 (RCRA) and was convicted of that charge after a jury trial. *Id.* at ___, 132 S Ct at
8 2349 (internal quotation marks omitted). RCRA violations are punishable by a fine of
9 not more than \$50,000 for each day of violation. The defendant objected to a proposed
10 \$38.1 million fine (the maximum for each of the 762 days between September 19, 2000
11 and October 19, 2004) because the jury could have found it guilty even if it had found
12 only a one-day violation. Therefore, the defendant maintained, the only violation that the
13 jury necessarily found was for one day, and imposing a fine greater than \$50,000 would
14 require factfinding by the court in contravention of *Apprendi*. *Id.* at ___, 132 S Ct at
15 2349. The Supreme Court held that the rule of *Apprendi* applies to the imposition of
16 criminal fines. *Id.* at ___, 132 S Ct at 2357. In reaching that conclusion, the Court
17 observed that "[c]riminal fines, like * * * other forms of punishment, are penalties
18 imposed by the sovereign for the commission of offenses" and that "the amount of a fine,

³ *Southern Union Co.* was decided after the trial court ordered restitution in this case. However, as explained in *State v. Jury*, 185 Or App 132, 136, 57 P3d 970 (2002), *rev den*, 335 Or 504 (2003), whether error is "apparent" is determined by reference to the law as of the time the appeal is decided.

1 like the maximum term of imprisonment or eligibility for the death penalty, is often
2 calculated by reference to particular facts [such as] the amount of the defendant's gain or
3 the victim's loss[.]" *Id.* at ____, 132 S Ct at 2350-51. The government conceded that the
4 trial court had made factual findings (*i.e.*, about the number of days that the defendant
5 had violated RCRA) that increased the fine that the court imposed. *Id.* at ____, 132 S Ct at
6 2352. In doing so, the court took action that was "exactly what *Apprendi* guards against:
7 judicial factfinding that enlarges the maximum punishment a defendant faces beyond
8 what the jury's verdict or the defendant's admissions allow." *Id.* at ____, 132 S Ct at 2352.

9 Defendant contends that, after *Southern Union Co.*, there is no dispute that
10 a jury must determine the facts that set the maximum amount of restitution that a court
11 may order a defendant to pay. In defendant's view, *Southern Union Co.* establishes that
12 *McMillan* and its progeny were erroneous. Defendant maintains that, under ORS
13 137.106, the maximum amount of restitution that a court can impose without factual
14 findings is zero. Accordingly, the jury verdict does not contain the information necessary
15 to allow the court to impose restitution greater than zero and, to impose restitution in an
16 amount greater than zero, the court must engage in the kind of factfinding that *Apprendi*
17 and related cases explain is inconsistent with the Sixth Amendment.

18 The state, for its part, contends that it is not "obvious" that *Apprendi* applies
19 to restitution or that *McMillan* was wrongly decided. The state observes that *Southern*
20 *Union Co.* addressed only the imposition of criminal fines and did not address restitution
21 at all, let alone what constitutes a statutory maximum for restitution purposes or whether

1 *Apprendi* would apply in the restitution context. The state also observes that, both before
2 and after *Southern Union Co.*, courts outside Oregon have uniformly held that *Apprendi*
3 and *Blakely* do not apply to restitution orders, and some of those courts have applied
4 reasoning similar to that in *McMillan*.

5 We agree with the state that any error under the Sixth Amendment in this
6 case is not plain. For one thing, as the state correctly notes, *McMillan* is not directly
7 called into question by *Southern Union Co.* because that case did not address restitution.
8 Moreover, the reasoning in *McMillan* may or may not be inconsistent with *Southern*
9 *Union Co.*--and that uncertainty means that the legal point that defendant raises is not
10 obvious.

11 In *Southern Union Co.*, the jury's verdict was equally consistent with a
12 finding of a one-day violation and a 762-day violation; to order a fine greater than
13 \$50,000, the trial court had to find facts beyond those evident from the verdict. 567 US
14 at ___, 132 S Ct at 2356. In *McMillan*, by contrast, we explained that "[t]he statutory
15 maximum is * * * the amount of [economic] damages as determined by the court, and no
16 more." 199 Or App at 403. In other words, under Oregon's statutory restitution scheme,
17 there is only one restitution outcome that is consistent with a jury's verdict--restitution for
18 the full amount of the victim's economic damages--and so restitution cannot go beyond
19 the jury's verdict or increase the penalty for the crime beyond the statutory maximum.
20 By that reasoning, determinations that underlie a restitution award can never exceed the

1 jury's verdict.⁴

2 On the other hand, it may be--as defendant argues--that the "natural next
3 step" is to apply reasoning similar to that in *Southern Union Co.* to restitution.

4 Restitution, like fines, is a form of punishment. *State v. Hart*, 299 Or 128, 138-39, 699
5 P2d 1113 (1985). In *Southern Union Co.*, the potential amount of the fine ranged from

⁴ Other courts that have considered similar issues in the wake of *Southern Union Co.* have uniformly concluded either that judicial determinations underlying restitution awards do not violate the Sixth Amendment or that any error in the restitution context was not plain under *Southern Union Co.* See *U.S. v. Rogers*, 2014 WL 4401044 at *4 (6th Cir 2014) (rejecting argument that *Southern Union Co.* requires jury factfinding for restitution); *U.S. v. Rosbottom*, 763 F3d 408, 419-20 (5th Cir 2014) (error in restitution not plain under *Southern Union Co.*; reasoning in part that *Apprendi* is inapposite in the restitution context because no statutory maximum applies); *U.S. v. Green*, 722 F3d 1146, 1149-51 (9th Cir), *cert den*, ___ US ___, 134 S Ct 658 (2013) (error in restitution context not plain under *Southern Union Co.*; reasoning in part that *Southern Union Co.* concerned a determinate punishment scheme with statutory maximums, while restitution carries no statutory maximum and is instead pegged to the amount of a victim's loss); *U.S. v. Day*, 700 F3d 713, 732 (4th Cir 2012), *cert den*, ___ US ___, 133 S Ct 2038 (2013) (logic of *Southern Union Co.* reinforces the conclusion--uniform among the federal circuits before *Southern Union Co.*--that *Apprendi* does not apply to restitution because *Southern Union Co.* makes clear that *Apprendi* requires jury determinations only of those facts that can be used to increase the penalty for a crime beyond the statutory maximum and restitution does not increase the penalty for a crime beyond the statutory maximum); *People v. McKinley*, No 307360, 2013 WL 2120278 at *8 (Mich Ct App May 16, 2013), *vac'd on other grounds*, 496 Mich 410, 852 NW2d 770 (Mich 2013) (*Southern Union Co.* requires proof beyond a reasonable doubt of only those facts that are used to elevate a sentence above the statutory maximum; because there is no prescribed maximum under Michigan's restitution scheme, that the amount of restitution ordered varies with the defendant's conduct does not offend due process); *Smith v. State*, 990 NE2d 517 (Ind Ct App 2013), *transfer den*, 994 NE2d 732 (Ind 2013) (same; relies on *Day*). See also *U.S. v. Sigillito*, 759 F3d 913, 934-36 (8th Cir 2014) (concluding that any error in the forfeiture context was not plain under *Southern Union Co.* because forfeiture provisions have no statutory maximum and, accordingly, are not subject to the jury factfinding requirement that applies to determinate sentencing; "a judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no statutory maximum" (internal quotation marks and brackets omitted)); *U.S. v. Phillips*, 704 F3d 754, 769-70 (9th Cir 2012), *cert den*, ___ US ___, 133 S Ct 2796 (2013) (similar).

1 \$50,000 to \$38.1 million and depended upon the trial court determining the predicate fact
2 (number of days of violation) in order to arrive at the amount to award. Similarly, in
3 defendant's view, the statutory maximum for restitution can range from zero to an
4 "indeterminate, potentially vast amount" and depends upon the trial court determining
5 predicate facts (the amount of the victim's damages) in order to arrive at the amount to
6 award. So viewed, the statutory maximum allows for a range of restitution awards, as did
7 the statutorily uncertain fine in *Southern Union Co.*, and so defendant may be correct that
8 we must overrule *McMillan* in light of *Southern Union Co.*

9 Whatever the ultimate outcome, there is a reasonable dispute about whether
10 the Sixth Amendment requires jury factfinding under Oregon's restitution scheme.
11 Accordingly, any error is not apparent, and we will not reverse the trial court on this
12 point.

13 Defendant next argues that Article I, section 17, requires jury determination
14 of the facts underlying restitution. Under Article I, section 17, "[i]n all civil cases the
15 right of Trial by Jury shall remain inviolate." Defendant again concedes that precedent is
16 against her, recognizing that Oregon courts have consistently held that Article I, section
17 17, does not apply to the determination of restitution. *E.g., Hart*, 299 Or at 139 (holding
18 that criminal defendant was not entitled to a jury trial on the issue of restitution under
19 ORS 137.106); *State v. N. R. L.*, 249 Or App 321, 332, 277 P3d 564 (2011), *aff'd*, 354 Or
20 222, 311 P3d 510 (2013) (holding that youth in juvenile delinquency proceeding was not
21 entitled to a jury trial on the issue of restitution under ORS 419C.450); *State v. Hval*, 174

1 Or App 164, 181, 25 P3d 958, *rev den*, 332 Or 559 (2001) (holding that criminal
2 defendant was not entitled to a jury trial on the issue of restitution under the Oregon
3 Vehicle Code). Defendant--as of the time of her brief--predicts that the Oregon Supreme
4 Court will reverse our decision in *N. R. L.* and extend the civil jury trial right to
5 restitution determinations. She requests that we "recognize that the law is unsettled in
6 this area and * * * consider forestalling further litigation in this case by anticipating the
7 [S]upreme [C]ourt's decision in *N. R. L.* by reversing the trial court's restitution order in
8 this case."

9 Ultimately, defendant pins her hopes on *N. R. L.* being decided in her favor
10 before we decide her appeal. Only then, under *State v. Jury*, 185 Or App 132, 136, 57
11 P3d 970 (2002), *rev den*, 335 Or 504 (2003) (holding that whether error is "apparent" is
12 determined by reference to the law as of the time the appeal is decided), would any error
13 in awarding restitution without jury findings be plain. The Supreme Court has now
14 decided *N. R. L.*, but not in a manner favorable to defendant's position. To the contrary,
15 in *N. R. L.*, the court held that a restitution determination in a juvenile delinquency
16 proceeding is not civil in nature and that Article I, section 17, therefore does not require a
17 jury trial of those determinations. *State v. N. R. L.*, 354 Or 222, 234, 311 P3d 510 (2013).
18 In reaching that conclusion, the court relied on, and certainly did not retreat from, *Hart*,
19 which reached the same conclusion about restitution determinations under ORS 137.106
20 in criminal cases. *N. R. L.*, 354 Or at 226-27. It is not plain that Article I, section 17,
21 requires a jury trial on the factual predicates to restitution. Defendant's unpreserved

1 argument to that effect does not qualify for review as error apparent on the record.

2 We turn to defendant's second assignment of error. As noted, in this
3 assignment of error, defendant disputes parts of the restitution that she was ordered to pay
4 to Oregon Mutual, with whom she had an insurance policy for the contents of her
5 restaurant. We review sentencing decisions, including restitution orders, for legal error.
6 *State v. Ferrara*, 218 Or App 57, 67-68, 178 P3d 250, *rev den*, 344 Or 539 (2008).

7 Along with two counts of arson, defendant was convicted of one count of
8 attempted aggravated theft by deception. The state's theory of that charge was that
9 defendant, with intent to defraud, attempted to obtain Oregon Mutual's property by
10 creating a false impression (that the fire had been set accidentally and not through her
11 own fault) that she did not believe to be true when she filed her insurance claim. In other
12 words, as the state put it in its opening statement at trial, "She's attempting to steal more
13 than \$10,000 through fraud from the Oregon Mutual Insurance Company, which was her
14 insurance company." Accordingly, Oregon Mutual was the victim of defendant's
15 attempted theft by deception and, the state contended, was entitled to restitution for the
16 economic damages that it suffered as a result of defendant's commission of that crime.

17 The evidence surrounding defendant's crimes and Oregon Mutual's
18 expenses was as follows. Defendant set fire to the restaurant in December 2008, and,
19 within a day, called Oregon Mutual to make a claim for loss to business property.
20 Oregon Mutual investigated the claim. Oregon Mutual hired attorney Daniel Thenell of
21 the law firm Smith Freed & Eberhard (Smith Freed) in December 2008 to "provide legal

1 guidance to the insurance company to determine its coverage obligations" and to "help[]
2 steer the investigation into the cause and origin of the fire and whether there would be
3 coverage for the fire." At defendant's trial, Thenell explained that his "practice is a bit
4 unique, [in that] I do coverage investigations for insurance companies." The majority of
5 his work involves insurance claims "where there is some suspicion of insurance fraud or
6 misrepresentation in order to obtain insurance benefits."

7 Thenell himself participated quite actively in the investigation. He also
8 retained others to assist in the investigation: a private fire investigation firm, ORCA Fire
9 Investigations (ORCA), to investigate the cause and origin of the fire; CASE Forensics to
10 examine and test electrical components in order to determine the cause and origin of the
11 fire; and Myron Sanders, a private investigator with Expert Investigations, to take witness
12 statements and gather information. Thenell ordered a credit check on defendant that
13 revealed defendant's financial situation, including the fact that she was behind on her
14 home mortgage.

15 Thenell, Ryan Fields of ORCA, and Ivan VanDeWege of CASE Forensics
16 inspected the scene soon after the fires. Fields examined the property and took
17 photographs and samples of materials from the scene. VanDeWege assisted with the
18 collection of evidence, took photographs, and tested the restaurant's electrical system.
19 CASE Forensics tested and retained the materials that Fields and VanDeWege had
20 collected.

21 Also as part of Oregon Mutual's investigation of this claim, defendant

1 submitted to an examination under oath in late January 2009. The examination under
2 oath was transcribed.

3 Ultimately, defendant's claim to Oregon Mutual was denied "within 35 days
4 of the loss" because of defendant's misrepresentation.

5 As of the date of trial, Oregon Mutual had expended \$28,417.98. The state
6 presented the following evidence supporting its request for restitution in that amount to
7 Oregon Mutual: (1) invoices from Smith Freed for lawyer and paralegal time, and costs;
8 (2) invoices from CASE Forensics for time and expenses of investigation, evidence
9 storage, and time and expenses of grand jury testimony; (3) invoices from ORCA for
10 time and expenses of investigation, time and expenses of grand jury testimony;
11 (4) invoices from Expert Investigations for time and expenses of investigation; and (5) an
12 invoice from Zaro|Pietka Realtime Reporting for court reporter services related to
13 defendant's examination under oath.

14 Defendant objects to two categories of restitution: (1) attorney fees paid to
15 Smith Freed and (2) expenses related to CASE Forensics' and ORCA's employees' grand
16 jury and trial testimony. She alternatively contends that the restitution award should not
17 have included any expenses that Oregon Mutual incurred after it denied her claim.⁵ The

⁵ We note that defendant makes passing, undeveloped suggestions that none of the restitution awarded to Oregon Mutual was proper. However, she develops arguments related only to the fees paid to Smith Freed, the expert witness fees for appearance at grand jury and trial, and those expenses incurred after Oregon Mutual denied her claim. To the extent that defendant's brief could be understood to argue that other parts of the restitution award to Oregon Mutual were improper, we reject that undeveloped argument without further discussion. *See, e.g., Cunningham v. Thompson*, 188 Or App 289, 297

1 state responds that all the challenged categories of restitution are objectively verifiable
2 monetary losses resulting from defendant's criminal activities and, thus, are appropriate
3 subjects of restitution. For the reasons that follow, we agree with the state.

4 We begin our analysis by setting out the relevant statutes. ORS 137.106
5 provides, in part:

6 "(1)(a) When a person is convicted of a crime * * * that has resulted
7 in economic damages, the district attorney shall investigate and present to
8 the court * * * evidence of the nature and amount of the damages. * * * If
9 the court finds from the evidence presented that a victim suffered economic
10 damages, * * * the court shall enter a judgment or supplemental judgment
11 requiring that the defendant pay the victim restitution in a specific amount
12 that equals the full amount of the victim's economic damages * * *."

13 For the purposes of that statute, "economic damages" is defined by ORS 31.710(2)(a):

14 "'Economic damages' means objectively verifiable monetary losses
15 including but not limited to reasonable charges necessarily incurred for
16 medical, hospital, nursing and rehabilitative services and other health care
17 services, burial and memorial expenses, loss of income and past * * *
18 impairment of earning capacity, reasonable and necessary expenses
19 incurred for substitute domestic services, recurring loss to an estate,
20 damage to reputation that is economically verifiable, reasonable and
21 necessarily incurred costs due to loss of use of property and reasonable
22 costs incurred for repair or for replacement of damaged property, whichever
23 is less."⁶

24 As we recently reiterated in *State v. Pumphrey*, 266 Or App 729, 733, ___ P3d ___
25 (2014), there are three prerequisites to an order of restitution: (1) criminal activities, (2)

n 2, 71 P3d 110 (2003), *rev den*, 337 Or 327 (2004) ("Ordinarily, the appellate courts of this state will decline to address an undeveloped argument.").

⁶ The statutory definition of "economic damages" also includes "future impairment of earning capacity." ORS 31.710(2)(a). However, that aspect of the definition does not apply to restitution awarded under ORS 137.106. ORS 137.103(2)(a).

1 economic damages, and (3) a causal relationship between the two. (Citing *State v.*
2 *Carson*, 238 Or App 188, 192, 243 P3d 73 (2010); *State v. Stephens*, 183 Or App 392,
3 395, 52 P3d 1086 (2002)).

4 To the extent that defendant contends that "economic damages" are limited
5 to those that would be recoverable in a civil action, we reject that argument. In 2005, the
6 Legislative Assembly amended ORS 137.103 and ORS 137.106 to expand the scope of
7 restitution. Under the former version of the statutes, a victim was entitled to restitution if
8 the victim had suffered "pecuniary damages" as a result of a defendant's criminal
9 activities. ORS 137.106 (2003), *amended by* Or Laws 2005, ch 564, § 2. "Pecuniary
10 damages," in turn, was defined as "all special damages, but not general damages, which a
11 person could recover against the defendant in a civil action arising out of the facts or
12 events constituting the defendant's criminal activities [listing examples]." ORS 137.103
13 (2003), *amended by* Or Laws 2005, ch 564, § 1. After the amendments, a victim is
14 entitled to restitution of "economic damages," which term--as noted above--has the broad
15 meaning set out in ORS 31.170(2)(a): "objectively verifiable monetary losses [listing
16 examples]." *See also* Tape Recording, House Committee on Judiciary, HB 2230, Jan 24,
17 2005, Tape 137, Side A (statement of Fred Boss, Chief Counsel of the Oregon
18 Department of Justice's Civil Enforcement Division; introducing the bill on behalf of its
19 sponsor, the Attorney General's Restitution Reform Task Force, and explaining that the
20 bill was intended to replace the term "pecuniary damages"--and specifically including the
21 requirement that the damages would have been recoverable in a civil action--with the

1 concept of "economic damages").⁷

2 We turn to the question of whether there was a sufficient causal connection
3 between defendant's criminal activities and the challenged parts of Oregon Mutual's
4 economic damages. As we explained in *Pumphrey*, a defendant's criminal activities must
5 be a "but for" cause of the victim's economic damages. 266 Or App at 734 (citing *State v.*
6 *Ceballos*, 235 Or App 208, 215, 230 P3d 954, *rev den*, 348 Or 669 (2010)); *State v.*
7 *Bullock*, 135 Or App 303, 307, 899 P2d 709 (1995)). The damages need not, however, be

⁷ Suggestions in some of our cases that the "recoverable in a civil action" requirement still applies to restitution are *dicta* and we disavow them. *E.g.*, *State v. Labar*, 259 Or App 334, 336-37, 314 P3d 328 (2013), *rev den*, 355 Or 317 (2014) (stating that the "economic damages that a court may award as restitution to a crime victim are the economic damages that the victim could recover against the defendant in a civil action for the defendant's conduct" in a case in which the state did not argue that restitution damages no longer require a civil theory of recovery); *State v. White*, 249 Or App 166, 167-68, 274 P3d 313 (2012) (stating that, for purposes of determining the full amount of a victim's damages under ORS 137.106, the court may consider the damages recoverable in a civil action arising out of the crime of conviction, but disallowing challenged restitution because it was not an objectively verifiable monetary loss); *State v. Carson*, 238 Or App 188, 192, 243 P3d 73 (2010) (stating that trial courts may "impose restitution for damages recoverable in a civil action arising out of the facts or events constituting" the defendant's criminal activities in a case that turned on construction of the defendant's plea agreement (internal quotation marks omitted)). *Cf. State v. Alego*, 354 Or 236, 239, 242, 245, 311 P3d 865 (2013) (the court asked the parties to brief whether a court may grant restitution that exceeds the amount that petitioner could have recovered in a civil action but declined to address crime victim's argument that ORS 137.106 now requires restitution "in full" of a victim's damages because the legislature has limited that court's review of crime victims' claims under ORS 147.535(3) to considering whether the trial court committed constitutional error); *State v. Kephart*, 249 Or App 360, 277 P3d 570 (2012) (parties' dispute hinged on whether parties stipulated to the application of the 1991 version of the restitution statutes: the defendant argued that 1991 version applied and that civil theory of recovery was necessary, while the state argued that the current version applied and that, accordingly, no civil theory of recovery was necessary; the defendant did not dispute the state's assertion that restitution was permissible under the current version of the restitution statutes).

1 the direct result of the defendant's criminal activities. *Pumphrey*, 266 Or App at 734
2 (citing *Stephens*, 183 Or App at 396; *Bullock*, 135 Or App at 307).

3 In *Pumphrey*, the victim obtained a stalking protective order (SPO) against
4 the defendant, which the defendant was convicted of violating. The defendant challenged
5 five items of restitution: (1) the cost of changing the victim's phone number; (2) the cost
6 of changing locks on the victim's home; (3) the cost of the victim renting a temporary
7 residence; (4) the victim's lost wages from one day's work when she facilitated changing
8 her locks; and (5) the cost of obtaining police records from a different incident in a
9 different city. It was undisputed that the defendant's violations of the SPO caused the
10 victim to suffer severe panic attacks and fear, and the record supported an inference that,
11 by taking safety precautions and other actions, the victim addressed the psychological
12 trauma caused by the defendant's violations of the SPO. We concluded that, because
13 there was evidence that the need for those expenses resulted from the defendant's
14 criminal actions, the causal connection was sufficient. *Id.* at 735-36; *see also Ceballos*,
15 235 Or App at 214-15 (rejecting the defendant's argument that, because the decedent
16 someday would have died anyway, there was an insufficient causal connection between
17 his killing the victim's decedent and the decedent's funeral expenses); *Stephens*, 183 Or
18 App at 397 (the defendant's criminal activities of exercising control over, possessing, and
19 using a car without the owner's permission--which included leaving the car unprotected
20 in a friend's yard--facilitated the theft of the car's wheels and tires; thus, the link between
21 the criminal activities and the damage that occurred was sufficient to support restitution).

1 On the other hand, where there is not even a "but for" connection between a
2 defendant's criminal activities and a victim's expenses, we have held that restitution is not
3 proper. *See State v. Steckler*, 236 Or App 524, 237 P3d 882 (2010). In *Steckler*, the
4 defendant had robbed a pharmacy. The pharmacy then installed a surveillance system.
5 The state put on evidence that, because it had been robbed, the pharmacy had to report
6 planned safety measures to the DEA; however, it put on no evidence that the DEA had
7 required it to install the surveillance system. Accordingly, we concluded that the state
8 had failed to prove that the pharmacy incurred the expense but for the robbery. *Id.* at
9 528-29; *see also Pumphrey*, 266 Or App at 736-37.

10 In this case, defendant, with intent to defraud, made a false claim on her
11 insurance policy with Oregon Mutual. It is undisputed that, as a result of defendant's
12 knowingly false claim, Oregon Mutual undertook an investigation and that the need for
13 that investigation flowed only from defendant's false claim. It is also undisputed that
14 Oregon Mutual's investigation addressed the harm posed by defendant's actions, *i.e.*, the
15 possibility of paying out on a false claim. Put another way, but for defendant's false
16 claim, Oregon Mutual would not have incurred any of the expenses of investigating that
17 claim, including the attorney fees paid to Smith Freed in connection with leading and
18 participating in the investigation.

19 As to the expenses that Oregon Mutual incurred after it decided to deny
20 defendant's claim (which include the challenged charges related to CASE Forensics' and
21 ORCA's employees' grand jury and trial testimony), the record supports an inference that
22 those expenses were incurred because of defendant's criminal activities and obligations

1 that arose for Oregon Mutual as a result of defendant's criminal activities. Those
2 expenses included amounts that Smith Freed charged Oregon Mutual in the course of
3 facilitating Oregon Mutual's cooperation with investigations by the State Fire Marshal
4 and Oregon State Police (OSP), and the state's prosecution of defendant--including
5 providing documentation to those public officials and agencies--as well as the charges
6 related to CASE Forensics' and ORCA's employees' grand jury and trial testimony.

7 First of all, it is undisputed that, had defendant not intentionally set fires
8 (committing arson) and made a false insurance claim (committing attempted theft), there
9 would have been no investigation by the State Fire Marshal or OSP, and no prosecution
10 by the state. Thus, defendant's criminal actions instigated those investigations and
11 prosecution, and, in turn, resulted in the expenses that Oregon Mutual incurred in
12 connection with those investigations and prosecution, regardless of whether it incurred
13 those expenses before or after it denied defendant's claim. Moreover, Oregon Mutual's
14 participation in those investigations and prosecution was not optional and, in fact, was a
15 predicate to it obtaining any restitution at all. Under ORS 476.270(1), an insurance
16 company must make a report to the State Fire Marshal whenever the company has reason
17 to believe that a fire loss to its insured was caused by incendiary means.⁸ Once an
18 insurance company has provided that report, the insurance company must release any
19 information relating to that loss that public officials request. ORS 476.270(2). Similarly,

⁸ The adjective "incendiary" means "of, relating to, or involving a deliberate burning of property." *State v. Luers*, 211 Or App 34, 54, 153 P3d 688, *adh'd to as modified on recons*, 213 Or App 389, 160 P3d 1013 (2007) (citing *Webster's Third New Int'l Dictionary* 1141 (unabridged ed 2002)).

1 an insurance company must cooperate with and provide any requested nonprivileged
2 information to law enforcement or other agencies that are investigating or prosecuting
3 suspected criminal conduct involving insurance. ORS 731.592(1), (2). If the insurer fails
4 to cooperate or provide information under ORS 731.592(1) and (2), it is not eligible for
5 restitution under ORS 137.106. ORS 731.592(5).

6 Defendant's intentional conduct in setting fires and submitting a false
7 insurance claim were the but for cause of investigations by the State Fire Marshal and
8 OSP, and the state's prosecution. Oregon Mutual's participation was, by law, a necessary
9 element of those investigations and prosecution, regardless of whether that participation
10 occurred before or after Oregon Mutual denied defendant's claim. The expenses that
11 Oregon Mutual incurred after it denied defendant's claim were not so remote from
12 defendant's criminal activities that there was no causal connection between them. The
13 trial court did not err in ordering the challenged items of restitution.

14 Affirmed.