IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
*Plaintiff-Respondent,*

*v.*

DAMIEN LEVI DICKINSON,
*Defendant-Appellant.*

Washington County Circuit Court
16CR26286; A164235

James Lee Fun, Jr., Judge.

Submitted October 19, 2018.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Kristin A. Carveth, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Michael A. Casper, Assistant Attorney General, filed the brief for respondent.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

AOYAGI, J.

Remanded for resentencing.

**AOYAGI, J.**

Defendant appeals a judgment of conviction for attempted second-degree rape, ORS 163.365 and ORS 161.405, and a supplemental judgment awarding criminal restitution. During sentencing, a criminal defendant may be ordered to pay restitution for a victim's objectively verifiable monetary losses, including "reasonable" medical and hospital charges that were "necessarily incurred." ORS 31.710 (2)(a); *see* ORS 137.103(2) (generally adopting the definition of "economic damages" in ORS 31.710). In his sole assignment of error, defendant challenges an award of $5,281.74 in restitution for a victim's hospital and medical expenses, arguing that the state failed to present evidence that the charges were reasonable and necessarily incurred. We agree with defendant that, because the state presented no evidence regarding the necessity of the medical services underlying the charges, the sentencing court erred. Accordingly, we remand for resentencing.

We review orders of restitution for errors of law and are bound by the trial court's factual findings if they are supported by any evidence in the record. *State v. McClelland*, 278 Or App 138, 141, 372 P3d 614 (2016).

Defendant pleaded guilty and was convicted of attempted second-degree rape. Although his conviction was for an attempt crime (pursuant to a plea agreement), defendant admitted that he had sex with the victim and impregnated her. During sentencing, the state asked that defendant be ordered to pay $5,281.74 in restitution to Tuality Health Alliance (THA), the victim's health insurer, for medical and hospital expenses related to pregnancy, childbirth, and nursing that THA had paid on the victim's behalf. *See State v. Campbell*, 296 Or App 22, 26-27, 438 P3d 448 (2019) (summarizing criminal restitution procedures); *State v. Pumphrey*, 266 Or App 729, 733, 338 P3d 819 (2014), *rev den*, 357 Or 112 (2015) (recognizing that restitution may be ordered for economic damages arising from "criminal activities," which ORS 137.103(1) defines to mean "any offense with respect to which the defendant is convicted or any other criminal conduct admitted by the defendant").

At the restitution hearing, the state called one witness, an attorney, who testified that his client, THA, had paid $5,281.74 in claims for the victim, specifically claims "related to a pregnancy or a medical issue," as shown on THA's payment ledger, which was admitted into evidence as Exhibit A. That was the entirety of the substantive testimony. As for Exhibit A itself, THA's payment ledger is a spreadsheet with 10 rows and 16 columns. Based on the attorney's testimony, it is reasonable to infer that each row reflects a medical or hospital bill that THA paid on the victim's behalf. As for the columns, the column headings are illegible, and many columns contain numbers or codes without an obvious meaning. However, the ledger does indicate that the victim received hospital or medical services from five providers[1] between August 5, 2015 and September 23, 2015. The ledger describes the services provided as (1) "LAB/BACT-MICRO"; (2) "LAB/BACT-MICRO"; (3) "ULTRASOUND"; (4) "US PG UTRUS B-SCAN [illegible]"; (5) "Neuraxial labor analgesia/anesthes [cut off]"; (6) "Vaginal delivery w/o complicating d [cut off]"; (7) "ROUTINE OB CARE W/ ANTPRTM CA [cut off]"; (8) "Daily management of epidural or su [cut off]"; (9) "BREAST PUMP, ELECTRIC, ANY TYPE"; and (10) "DME MISCELLANEOUS."[2] Finally, the ledger shows a charge for each line item—with the 10 charges totaling $6,402.37—and how much THA paid for each line item—with the 10 payments totaling $5,281.74.

The trial court ordered the requested restitution, reasoning that the victim's expenses were "economic damages" and were a reasonably foreseeable consequence of defendant's criminal activities. On appeal of the resulting judgment, defendant does not contest that THA qualifies as a victim for restitution purposes. *See* ORS 137.103(4)(d) (defining "victims" to include "[a]n insurance carrier" that "has expended moneys on behalf of" a crime victim). As he did below, however, defendant argues that the evidence was

[1] Five providers are listed in what appears to be a column identifying who provided the service or sent the bill: "Tuality Community Hospital," "Gullo (Med Imag GRP Hillsboro)," "Melbinger," "Moerkerke," and "Tuality Medical Equip & Supply."

[2] Where it is obvious that a text box contains more text than displayed, we have quoted the visible portion of the text with the notation "[cut off]."

insufficient to support the restitution award, specifically that the state failed to establish that the charges were reasonable and necessarily incurred. *See* ORS 137.106(1)(a) (the burden is on the state in a restitution proceeding to present "evidence of the nature and amount of the damages"). The state does not respond on the issue of necessity, apparently due to a misconception that the necessity of the services "is undisputed."[3] As to reasonableness, the state argues that, although an unpaid hospital bill is insufficient to establish reasonableness under *McClelland*, the evidence in this case is sufficient to establish reasonableness, because THA *paid* the bills and, moreover, paid them in a lesser amount than originally billed.[4]

"[W]hether the charges are reasonable and whether the treatment is necessary are two distinct questions." *Campbell*, 296 Or App at 35. Evidence of one does not necessarily establish the other. *See id.*; *cf. Sisters of St. Joseph v. Russell*, 122 Or App 188, 192, 857 P2d 192 (1993), *rev'd on other grounds*, 318 Or 370, 867 P2d 1377 (1994) (making similar distinction between reasonableness and necessity in a different context). Moreover, in expressly limiting restitution to "reasonable" and "necessarily incurred" medical and hospital expenses, the legislature appears to have affirmatively assumed that not all medical and hospital expenses

[3] At the restitution hearing, defendant argued that THA's attorney's testimony was insufficient to support an award of restitution, because "there [are] no statements related to the reasonableness of those procedures, whether or not they're required, or necessary, or anything else," and "[s]o I think under *Almaraz-Martinez*, the Court should deny the restitution request." *See State v. Almaraz-Martinez*, 282 Or App 576, 581, 385 P3d 1234 (2016) (reversing restitution award for lack of evidence). The state argued in rebuttal that the standard was "reasonable amount and necessarily incurred," that the expenses at issue were "directly related to the birth of the child," and that they were "items necessary for raising an infant and safely delivering a child." On appeal, defendant asserts in his opening brief that he preserved both the necessity and reasonableness issues, and he addresses both issues in his summary of argument and his argument. In response, the state is silent on the issue of necessity, except to refer once, in passing, to "the substantial number of cases like this one in which the necessity of treatment is undisputed." Although defendant could have delineated more clearly between the issues of necessity and reasonableness, we view both issues as adequately preserved in the trial court and adequately raised in the opening brief.

[4] Given our recent decision in *Campbell*, 296 Or App at 33, regarding evidence of payment of medical bills at Medicaid rates as evidence of reasonableness, we note that the record here is unclear as to whether THA paid the victim's medical bills at privately negotiated rates, Medicaid rates, or otherwise.

are reasonable or necessarily incurred. *See* ORS 31.710 (2)(a) (defining "economic damages"); ORS 137.103(2) (adopting that definition, with limited exception, for restitution purposes).

In this case, the only evidence that the state presented at the restitution hearing was THA's payment ledger and brief testimony by an attorney for THA as to what the ledger showed. There was no testimony by medical professionals regarding the nature of the services referenced on the ledger or their necessity—*see White v. Jubitz Corp.*, 219 Or App 62, 68, 182 P3d 215 (2008), *aff'd*, 347 Or 212, 219 P3d 566 (2009) (typically, in civil actions, plaintiffs have "presented evidence of the reasonableness and necessity of medical expenses through testimony of physicians and other medical professionals familiar with the injury, treatment, and costs involved")—nor was there any other evidence regarding the nature of the services provided or their necessity.

It is established by existing case law—and the statute itself—that there is no presumption that medical or hospital charges are reasonable. It is also established that the sentencing court cannot rely on common sense alone to assess the reasonableness of medical or hospital charges; rather, the state must present sufficient evidence for the court to make a finding on reasonableness that is supported by the evidence. *McClelland*, 278 Or App at 146-47. In *McClelland*, the defendant tackled the victim and severely injured the victim's knee. *Id.* at 140. The victim incurred significant medical expenses as a result, including $27,677 for knee surgery. The defendant was convicted of assault, and, during sentencing, the state asked the court to order the defendant to pay restitution for the victim's surgical expenses. In support of that request, the state offered into evidence the hospital bill as proof of what the victim had been charged for the surgery. *Id.* at 139-40. The trial court ruled, partly based on "common sense," that the charges were reasonable. *Id.* at 140-41. We reversed, explaining that the state had to present "[s]ome additional testimony or evidence" to establish the reasonableness of the amounts billed for the hospital or medical services. *Id.* at 144. Mere evidence of the charges was legally insufficient to prove their

reasonableness. *Id*. at 146. Of particular significance, we stated that "the trial court could not simply rely on a review of the bill and 'common sense' to conclude that such charges were reasonable," because "[t]he finder of fact cannot be presumed to know what is a 'reasonable' charge for medical services based on their own experience and without further evidence." *Id*. at 146-47.

We reach a similar conclusion here with respect to the necessity of medical or hospital services. Specifically, we conclude that a sentencing court cannot presume that medical or hospital services provided to a crime victim were necessary, merely by virtue of the fact that they were provided, because such a presumption would be inconsistent with the statute. *See* ORS 137.103(2) (incorporating ORS 31.710's definition of "economic damages," which expressly limits recovery of hospital and medical charges to those that are "reasonable" and "necessarily incurred"). As for relying on common sense or common knowledge alone to determine the necessity of the services—as the trial court appears to have done in this case—we do not foreclose the possibility that some services may be so obviously necessary as to allow that, but the evidence in this case was insufficient for the court to do so.[5]

The hospital and medical expenses for which the court awarded restitution were provided by five different providers over a two-month period. Although some of the entries on THA's payment ledger are written so as to give a layperson a general sense of the type of services provided—some type of lab test, an ultrasound, some type of routine obstetrical care, unspecified services related to vaginal delivery, a breast pump, etc.—the exact nature of the services is unclear (with the possible exception of the ultrasound and the breast pump). A *general* understanding of the type of services provided is insufficient to allow

[5] While the reasonableness of medical charges may not be susceptible to assessment based on common knowledge alone, *McClelland*, 278 Or App at 146-47, it seems likely that the *necessity* of a particular medical service may be so obvious in some situations as to allow for reliance on common knowledge alone. For example, we doubt that it would require much evidence, let alone expert evidence, to establish that the expense of a tourniquet was necessarily incurred to stem the bleeding of a severed limb, or that the expense of an ambulance ride was necessarily incurred to transport a severely injured victim to the hospital.

a determination of necessity based on common knowledge alone. It is not enough to know that some type of "lab test" was performed. And entries like "vaginal delivery" are too generic to reveal to a layperson what services were actually billed under that line item, let alone assess their necessity—it is akin to a bill for "foot surgery" or "broken arm." If the sentencing court cannot assess the reasonableness of a medical charge without evidence, *see McClelland*, 278 Or App at 146-47, it is equally true that it cannot determine by common knowledge alone what medical services were provided, and whether they were necessary, from these types of generic one-line entries on an insurer's payment ledger.

In conclusion, although it is obvious that the victim in this case would have needed *some* medical treatment as a result of defendant's criminal activities, the sentencing court could not presume that all of the hospital and medical charges that THA paid on her behalf were necessarily incurred, nor was the evidence here sufficient for the court to rely solely on common knowledge to find that all of the charges were necessarily incurred.[6] Because the state failed to establish that the charges were necessarily incurred, we do not reach the second issue, which is whether proof that THA paid the bills—and specifically paid them in lesser amounts than originally billed—is legally sufficient evidence of reasonableness. The insufficiency of the evidence on necessity is dispositive. Accordingly, we conclude that the trial court erred in ordering restitution to THA in the amount of $5,281.74.

Remanded for resentencing.

[6] Defendant challenges the restitution judgment as a whole, and the state has not requested that we parse through the restitution award to determine whether *any* line item on THA's payment ledger would permit a necessity finding without other evidence.