IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL MARKNSEN, Appellant.	)	No. 67718-7-I DIVISION ONE UNPUBLISHED OPINION FILED: November 19, 2012

Leach, C.J. — Absent an agreement to the contrary, restitution in criminal cases is limited to losses caused by the crimes charged and may not be imposed for losses caused by the defendant's general scheme or uncharged acts. In this case, Michael Marknsen contends the restitution ordered following his guilty pleas to theft and other charges must be reversed because the losses were caused by a combination of charged and uncharged acts. Because the record supports a conclusion that the victim's lost wages, counseling expenses, and attorney fees would not have been incurred but for the charged crimes, we affirm the restitution for those losses. Because the State did not establish the same causal connection for the victim's prescription medication expenses, we reverse the restitution ordered for that loss.

FACTS

During the summer of 2007, Kirsten Theotig signed documents prepared by her boyfriend, Michael Marknsen, for the refinancing of her Kirkland home.

When Theotig discovered that, contrary to Marknsen's assurances, the refinancing had not resulted in the satisfaction of her debts, she contacted the King County Prosecutor's Office.

Theotig told prosecutors that Marknsen worked as a loan originator and told her the refinancing would pay off her mortgage and credit card debts. She also said that Marknsen had been physically abusive during their relationship and threatened her with physical harm if she declined to sign the paperwork. He told her before and after the signing that "[i]t's about getting out of here alive" and "I know where your family lives."

An investigation disclosed that the refinancing application contained forged bank documents concerning a nonexistent bank account and misrepresentations regarding Theotig's income. Investigators also learned that Marknsen's employer received an extraordinarily large broker fee of $31,551 for the refinancing and that checks intended to pay Theotig's creditors were altered and deposited in an account held jointly by Theotig and Marknsen. Theotig said she never received any of these funds and her debts were never paid off.

Based on these allegations, the State charged Marknsen with forgery, four counts of first degree theft, second degree identity theft, and obtaining a signature by deception or duress—domestic violence. Marknsen later pleaded guilty to obtaining a signature by deception or duress, two counts of first degree theft, and one count of attempted first degree theft.

At a subsequent restitution hearing, the State sought $40,014 in restitution for Theotig's losses. That sum included $24,300 for lost wages, $15,490 for legal fees, $103 for prescription medications, and $121 for counseling costs. The State also requested $1,468 in restitution for payments made by Theotig's health care provider, Anthem Blue Cross, for her counseling and prescriptions.

Theotig testified that she was unable to work for four months because the prospect of confronting Marknsen in court "reopened the wound" created by his crimes. She sought legal help "to regain monies that [Marknsen] stole," to "keep my house over my head," and to obtain bankruptcy protection. When asked whether she would have sought legal help "had Mr. Marknsen not run up your credit cards and taken out this horrible home loan," Theotig said, "Never."

The State's restitution evidence included a 2011 letter from Theotig's therapist, which stated in part,

> I first saw Ms. Theotig on 11/10/2010 for a psychiatric evaluation because of severe depression following her broken relationship with her boyfriend [Michael] Marknsen. He was physically abusive and illegally did away with all her money causing her to be a financial wreck. He stalked her after [his] release from prison. He had raped her roommate. Ms. Theotig became extremely anxious, fearful, could not go to work and went on disability. . . . She is extremely compromised emotionally and financially."
>
> DSMIV DIAGNOSIS:
> Axis:
> 1. PTSD-chronic
> 2. Major Depression Disorder. . .

. . . .

4. Social Strenuous-severe legal

Other evidence established that after the crimes at issue in this case, but before Marknsen's guilty plea, Marknsen engaged in additional uncharged acts of intimidation against Theotig. Those acts resulted in probation violations and convictions for violating a no-contact order and witness tampering.

Defense counsel argued that restitution should not be awarded because Theotig's losses were caused by a combination of charged and uncharged conduct. Counsel maintained that the State had the burden of demonstrating that part of the total loss due to each cause but had failed to do so. The prosecutor responded that there was no authority for the proposition that "the Court can only award restitution if the losses can be associated entirely and without any overlap with the charged crimes." Defense counsel then reminded the court of authority holding that restitution cannot be based on a defendant's general scheme or uncharged acts.

The court ordered the restitution sought by the State, ruling in part as follows:

> Well, I do find that the restitution requested here is a part of the things that were charged in this case. Certainly it would be hard to parse out exactly the source of Ms. Theotig's emotional upset, given that there are incidents of domestic violence, there's incidents of fraud, and so on, that Mr. Marknsen perpetrated on her. But it's quite clear that the time period that she was off from work was directly relate[d] to this case, because it was the time when this case was about to go to trial, and then when the sentencing was about to occur, both of which she would have had to testify had the case gone to trial.

> . . . It's not at all unusual for crime victims to feel very anxious about the prospect of having to testify and having to make a statement at sentencing.
>
> So it's not at all surprising that that would lead to the time that she had to have . . . off from work. So, I do find that there is a sufficient causal nexus here.

Over Marknsen's objections, the court also ordered him to pay $77,942.12 in attorney fees to the King County Office of Public Defense. Marknsen appeals.

DECISION

Unless the defendant expressly agrees otherwise, restitution in a criminal case is limited to losses caused by the charged crimes and may not be imposed for the defendant's general scheme or uncharged acts.[1] Losses are causally connected to a crime if the victim would not have incurred the loss "but for" the crime.[2] Courts determine whether a causal connection exists by looking at the facts underlying the defendant's crime,[3] and we review such determinations de novo.[4] The imposition of restitution is otherwise reviewed for abuse of discretion.[5] The State bears the burden of establishing restitution by a preponderance of the evidence.[6]

Citing the rule that restitution may not be imposed for uncharged acts, Marknsen contends the order of restitution must be vacated because Theotig's losses were caused by a combination of charged and uncharged acts. He

[1] State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d 350 (2005); State v. Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008).
[2] State v. Acevedo, 159 Wn. App. 221, 229-30, 248 P.3d 526 (2010).
[3] Acevedo, 159 Wn App. at 230.
[4] Acevedo, 159 Wn. App. at 230.
[5] State v. Kinneman, 122 Wn. App. 850, 857, 95 P.3d 1277 (2004).
[6] State v. Dennis, 101 Wn. App. 223, 226-27, 6 P.3d 1173 (2000).

argues that restitution for such losses is proper only if the State segregates the portions of the loss caused by the charged and uncharged acts. Although he cites no authority requiring segregation, such a requirement is arguably a logical extension of the rule against restitution for losses caused by uncharged acts.[7] On the other hand, demanding such segregation, particularly when the causes of a loss are indivisible, arguably undermines the principal goals of restitution, i.e., making offenders accountable and victims whole.[8] We conclude, however, that we need not resolve this question here. For the reasons set forth below, we conclude the State carried its burden of establishing a "but for" causal connection between the charged acts and all but one of Theotig's losses.

Marknsen challenges the restitution ordered for wages Theotig lost when she missed 15 weeks of work. He contends this loss resulted from both charged and uncharged acts, including the uncharged stalking of Theotig and the alleged rape of her roommate. The record, however, supports a conclusion that the loss was caused solely by the charged conduct. Theotig testified that she was unable to work because *the court proceedings in this case* reopened emotional

[7] See Kinneman, 122 Wn. App. at 870 (where only a portion of victims' fees and costs were attributable to charged acts, restitution was proper "[t]o the extent that [the victims] are able to segregate their fee and cost claims, and to demonstrate a causal connection between them and Kinneman's crimes"); see also State v. Eno, 143 N.H. 465, 470-71, 727 A.2d 981 (1999) ("Where several factors contribute to the loss suffered by the victim, the court should apportion the costs so that the ordered restitution reasonably represents the amount of the loss the victim sustained as a result of the offense.").

[8] State v. Gray, 174 Wn.2d 920, 929-34, 280 P.3d 1110 (2012); State v. Gonzalez, 168 Wn.2d 256, 265-66, 226 P.3d 131, cert. denied, 131 S. Ct. 318 (2010).

wounds and created debilitating stress and anxiety.[9] That testimony is supported by the timing of her work absence and counseling, both of which commenced shortly before the anticipated trial and continued through the entry of the judgment and sentence. It cannot be disputed that the court proceedings were due solely to the charged conduct. The trial court did not err in concluding that but for the charged conduct, Theotig would not have missed work and that she was entitled to restitution for her lost wages.

For the same reasons, we reject Marknsen's challenge to the restitution for counseling. Because the counseling coincided with Theotig's absence from work, the court could reasonably infer that her need for counseling, like her inability to work, was triggered by the court proceedings on the charged acts. The court did not err in concluding that but for Marknsen's charged conduct, the counseling expenses would not have been incurred.

Marknsen also challenges the restitution ordered for attorney fees Theotig incurred in the wake of the charged acts. One attorney assisted Theotig in filing for bankruptcy. The fees charged by that attorney were a direct result of the crimes charged in this case and were properly included in the order of restitution. Theotig's other attorney, Janyce Fink, was hired "to obtain a couple different restraining orders or no contact orders, as well as filing a civil suit to

[9] Any conflict between this testimony and the therapist's letter was for the court to resolve. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (matters of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence are for the trier of fact).

recover monies [Marknsen] had stolen [from a checking account], and the credit card debt as well as the refinance debt." Marknsen contends the court erred in ordering restitution for attorney Fink's fees for two reasons.

First, he claims the fees for pursuing a no-contact order were unnecessary because such an order had already been obtained by the State. The record belies this claim. All of attorney Fink's fees were charged and paid more than a year before the entry of the no-contact order cited by Marknsen.

Second, Marknsen contends Fink's fees were at least partly the result of uncharged acts, including Marknsen's stalking, physical abuse, and unauthorized alteration of the beneficiary designation for her 401(k) plan. But even assuming that is the case, Theotig testified unequivocally that she would not have sought Fink's services "had Mr. Marknsen not run up [her] credit cards and taken out this horrible home loan." Because the credit card debt and the loan were at the heart of the charged offenses, Theotig's testimony supports a conclusion that the fees were caused solely by the charged conduct.

We reach a different conclusion regarding the restitution ordered for Theotig's prescriptions. The prescriptions were filled between 2008 and 2011 and were written by five different prescribers. Theotig submitted nothing from the prescribers demonstrating the reason for the prescriptions. She simply stated in an attachment to her restitution estimate that the prescriptions were "due to anxiety, ulcers, migraines all from Post Traumatic Stress Disorder

[PTSD]." The only other reference to this diagnosis is in a 2011 letter from a therapist who first saw Theotig after most of the prescriptions were written and who wrote only one of the prescriptions included in the restitution amount. The record is silent as to when the PTSD diagnosis was first made and what events caused the disorder. Given that Marknsen committed uncharged acts during 2008 and 2009 that could have caused or contributed to Theotig's PTSD, we conclude that the record fails to establish a sufficient causal connection between the various medications and the charged acts.

Finally, Marknsen contends the court erred in ordering him to pay the cost of his court-appointed counsel without finding that he has the ability to pay those costs. He concedes that the court entered a "boilerplate" finding to that effect but contends it is insufficient and not supported by the record. These contentions are misplaced.

While sentencing courts must *consider* the defendant's ability to pay before imposing nonmandatory costs,[10] they need not enter findings.[11] The proper time for findings "is the point of collection and when sanctions are sought for nonpayment."[12] Here, the judgment and sentence recites that the court

[10] See RCW 10.01.160(3); State v. Baldwin, 63 Wn. App. 303, 308-12, 818 P.2d 1116 (1991); State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), review denied, No. 86903-1 (Wash. Oct. 10, 2012).

[11] State v. Blank, 131 Wn.2d 230, 241-42, 930 P.2d 1213 (1997); State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992).

[12] Blank, 131 Wn.2d at 241-42; State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008).

"considered" Marknsen's "present and likely future financial resources." That recitation satisfied the prerequisites for imposing discretionary financial obligations. Although the court also "concluded" that Marknsen had the present or likely future ability to pay the financial obligations, that conclusion or finding is immaterial and does not warrant relief even if it is not supported by the record.[13]

Reversed as to the cost of Theotig's prescription medication and otherwise affirmed.

Leach, C.J.

WE CONCUR:

Schindler, J.

Becker, J.

[13] State v. Caldera, 66 Wn. App. 548, 551, 832 P.2d 139 (1992).