

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	NO. 67804-3-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
NOE A. FUENTES,	)	UNPUBLISHED OPINION
	)	
Respondent.	)	FILED: August 13, 2012
	)	

Lau, J. — Fifteen-year-old Noe Fuentes pleaded guilty to third degree malicious mischief for throwing a rock through a vehicle window. The court imposed restitution for loss to the vehicle owner but refused to impose restitution for loss incurred by the owner's insurance provider. At issue here is the dispositional court's authority to deny financial restitution to an insurance provider under the Juvenile Justice Act restitution statutes. The court's authority to impose restitution in a juvenile case is purely statutory. Because the court's refusal to impose restitution for loss incurred by the insurance provider is based on impermissible general practice and mistaken legal standard, we reverse and remand for proceedings consistent with this opinion.

**FACTS**

The State charged 15-year-old Noe Fuentes with third degree malicious mischief

for throwing a rock through a vehicle window. Fuentes pleaded guilty as charged and agreed to pay restitution “in full to all victims on charged counts . . . .” At the disposition hearing, the court ordered restitution in an amount to be determined at a future restitution hearing.

The State requested \$500 restitution to the vehicle owner and \$1,639.22 to her insurer, American Family Insurance. At the start of the restitution hearing, defense counsel handed the court a financial declaration signed by Fuentes under penalty of perjury that “provides information as to [Fuentes’s] current financial status.” (Emphasis added.)<sup>1</sup> In the preprinted declaration, Fuentes indicated he had no assets, no income, no dependents, no debts or expenses, and was “not old enough to get a job.”<sup>2</sup> Defense counsel argued against imposing full restitution, but the court summarily ordered restitution in full to the owner and insurance provider: “I’m going to order the restitution in the amount that’s been requested of \$2,139.22.” When defense counsel reminded the court that the bulk of restitution was owed to American Family Insurance, the court changed its mind:

I am reminded by counsel that it is my practice and I will in this case order the \$500 as being the amount of restitution, and I’ll leave it to the insurance carrier, as capable as they are, if they wish to seek restitution, it wouldn’t be very difficult for them to get an order in that amount. So the amount of restitution ordered in this matter by the court will be \$500, though the court does recognize there’s additional insurance loss.

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<sup>1</sup> The record shows that Fuentes and the juvenile probation counselor attended the restitution hearing.

<sup>2</sup> This representation is questionable because under Washington Administrative Code 296-125-018, the minimum age for work in Washington state is normally 14 years old. Fuentes was nearly 16 years old at the time of the restitution hearing.

Report of Proceedings (Sept. 16, 2011) (RP) at 4 (emphasis added). Attempting to clarify the court's ruling, the State asked whether the court was "finding that the insurance company is not a victim or are you making a finding - -." RP at 4. The court responded, "I've made my decision and I'll rest on that." RP at 4 (emphasis added).

The State persisted:

[THE STATE]: Okay. And what about the financial ability of the defendant? Are you making a record on that for purposes of your decision?

COURT: I think he's going to have a hard time paying \$500. I mean, I'm not sure what you're asking me. If you want me to comment on what the likelihood is that this is going to be paid off at any time in the near future, I guess I could give you my opinion. It's probably not real likely.

[THE STATE]: And I just wanted to have some clarification on that issue since the RCW for restitution specifically requires a finding of the respondent's inability to financially, or to be financially able to pay back--

COURT: I appreciate that and I think I would make that finding.

RP at 4-5 (emphasis added). Defense counsel responded by referencing the juvenile probation counselor's (JPC) testimony—that Fuentes was not in school and was unable to work.<sup>3</sup> The State explained that Fuentes had over a 10-year period to pay the insurance provider \$1,600, that the court should order the full amount of restitution now in case Fuentes later became able to pay, and that he could be relieved of this obligation to pay if his future circumstances changed. Defense counsel argued it was logical to conclude Fuentes would likely be unable to pay.

The court returned to its earlier insurance provider comments:

COURT: Well, again, on the balance of things, again, my general feeling is that I'm primarily concerned with the, if there's going to be any emphasis that this court is going to place on where money goes and where it's paid, it's to the person who's had the out-of-pocket loss. I believe insurance carriers are more

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<sup>3</sup> Nothing in the record, including the clerk's minute entry, indicates testimony at the restitution hearing from Fuentes's JPC.

than capable, and it would be of no effort whatsoever if they decided to do it, to get a judgment against Mr. Fuentes for whatever amount is owed for that.

So I'll, having worked for insurance companies in the past, I will trust their ability to be made whole if they decide that it's worth doing that. So I think the Record's been made, my decision's been made and we'll go on.

I've signed the order setting restitution. We'll file the financial declaration with the clerk.

RP at 6-7 (emphasis added). The written order provides restitution to the vehicle owner but not to the owner's insurance provider. The State appeals.

### ANALYSIS

The State argues that the court failed to exercise its discretion when it categorically denied restitution to an insurance provider. The State also argues that even if the court exercised its discretion, it abused that discretion because it conducted no meaningful inquiry into the juvenile's ability to pay restitution within 10 years as required by the restitution statute. Fuentes counters that the court properly exercised its discretion to deny restitution to the insurance provider.

The general rule requires a juvenile court to order the juvenile offender to pay restitution to victims of the crime:

In its dispositional order, the court shall require the respondent to make restitution to any persons who have suffered loss or damage as a result of the offense committed by the respondent. In addition, restitution may be ordered for loss or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which, pursuant to a plea agreement, are not prosecuted.

RCW 13.40.190(1)(a). Two purposes of the Juvenile Justice Act are to "[m]ake the juvenile offender accountable for his or her criminal behavior" and to "[p]rovide for restitution to victims of crime." RCW 13.40.010(c) and (h).

“The court may determine the amount, terms, and conditions of the restitution including a payment plan extending up to ten years if the court determines that the respondent does not have the means to make full restitution over a shorter period.” RCW 13.40.190(1)(d). Prior to the expiration of the payment of the judgment, the court may extend the judgment for the payment of the restitution for an additional 10 years. RCW 13.40.190(1)(d). When an insurance provider suffers loss, it is a “victim” under the restitution provision. State v. A.M.R., 147 Wn.2d 91, 97, 51 P.3d 790 (2002); State v. Sanchez, 73 Wn. App. 486, 488-90, 869 P.2d 1133 (1994).

The juvenile court, however, may exercise discretion not to order restitution to an insurance provider based on the juvenile’s inability to pay over a 10-year period:

At any time, the court may determine that the respondent is not required to pay, or may relieve the respondent of the requirement to pay, full or partial restitution to any insurance provider authorized under Title 48 RCW if the respondent reasonably satisfies the court that he or she does not have the means to make full or partial restitution to the insurance provider and could not reasonably acquire the means to pay the insurance provider the restitution over a ten-year period.

RCW 13.40.190(1)(g) (emphasis added).<sup>4</sup> The authority to impose restitution in a

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<sup>4</sup> Fuentes discusses the history of the statute, apparently to emphasize the sentencing court’s discretion. The statute originally provided, “The court may not require the respondent to pay full or partial restitution if the respondent reasonably satisfies the court that he or she does not have the means to make full or partial restitution and could not reasonably acquire the means to pay such restitution over a ten-year period.” See, e.g., former RCW 13.40.190(1) (1996). In 1997, the legislature deleted this sentence, removing the court’s discretion not to order restitution based on the juvenile’s financial ability. A.M.R., 147 Wn.2d at 96 (discussing 1997 amendment deleting this discretionary language). In 2004, the legislature reinstated a court’s discretion, but only in the case of insurance companies. But neither side disputes that the court has discretion. Rather, the State argues that the sentencing court abused its discretion here.

juvenile case is purely statutory. State v. Keigan C., 120 Wn. App. 604, 607, 86 P.3d 798 (2004). “Our review of the trial court’s restitution order is limited to whether the court abused its discretion. An abuse of discretion occurs when the order is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” State v. Bennett, 63 Wn. App. 530, 533, 821 P.2d 499 (1991) (quoting State v. Smith, 33 Wn. App. 791, 798–99, 658 P.2d 1250 (1983)).

We first address the State’s contention that the court exercised no discretion when it categorically denies restitution to insurance providers. After defense counsel handed Fuentes’s financial declaration to the court, the court immediately imposed the full amount of restitution declaring: “I’m going to order the restitution in the amount that’s been requested of \$2,139.22.” RP at 3.

Defense counsel’s stated rationale for providing Fuentes’s declaration was “just simply to point out that the majority of his amount is to American Family Insurance.” RP at 3. The court responded by reversing its original decision, explaining, “I am reminded by counsel it is my practice” to deny restitution to insurance providers. RP at 4 (emphasis added). “I’ll leave it to the insurance carrier, as capable as they are, if they wish to seek restitution, it wouldn’t be very difficult for them to get an order in that amount. So the amount of restitution ordered in this matter by the court will be \$500 [to the owner], though the court does recognize there’s additional insurance loss.” RP at 4.

After the court reversed itself without hearing from the State on the juvenile’s ability to pay, the State asked the court, “[A]re you making a finding that the insurance

company is not a victim or are you making a finding - -." The court interrupted stating, "I've made my decision and I'll rest on that." RP at 4. The court briefly commented on Fuentes's financial circumstance and then returned to a discussion about its general practice of denying restitution to insurance providers. It expressed concern over "where money goes and where it's paid . . . . I believe insurance carriers are more than capable, and it would be of no effort whatsoever if they decided to do it, to get a judgment against Mr. Fuentes for whatever amount is owed for that. So I'll, having worked for insurance companies in the past, I will trust their ability to be made whole if they decide that it's worth doing that." RP at 6-7. The court signed the restitution order providing restitution to the vehicle owner but not to the owner's insurance provider. RP at 7. The record leaves no doubt the court denied restitution to the insurance provider here based on its general practice that restitution should not be ordered to an insurance provider. Fuentes's opposing arguments are unpersuasive and unsupported by the record. The court erred when it failed to exercise its discretion. State v. Flieger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) ("trial court's failure to exercise its discretion was an abuse of discretion").

Even if we assumed the court exercised its discretion rather than categorically denying restitution to an insurance provider, it applied the wrong legal standard. The court "shall require the respondent to make restitution to any persons who have suffered loss or damage . . ." RCW 13.40.190(1)(a). This obligation is relieved as to insurance providers only if "the respondent reasonably satisfies the court that he or she does not have the means to make full or partial restitution . . . and could not reasonably

acquire the means to pay . . . the restitution over a ten-year period.” RCW

13.40.190(1)(g).<sup>5</sup> We are unpersuaded that counsels’ joint effort to prompt the court to make the necessary relevant findings was successful as this record plainly demonstrates.<sup>6</sup>

When requested by the State to clarify the basis for its decision, the court was “not sure what you’re asking me, . . . If you want me to comment on what the likelihood is that this is going to be paid off at any time in the near future, I guess I could give you my opinion. It’s probably not real likely.” RP at 5. The State attempted to inform the court about the statute’s requirement—“a finding of the respondent’s inability to financially, or to be financially able to pay back - - .” The court interrupted, “I think I would make that finding.” RP at 5. Defense counsel requested the opportunity to support this finding with the JPC’s testimony that Fuentes was unemployed and not in school. As noted above, this testimony appears nowhere in our record. At defense counsel’s request, the court permitted defense counsel to cross out on the restitution

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<sup>5</sup> The obligation can also be relieved under RCW 13.40.200(4).

<sup>6</sup> At oral argument on appeal, Fuentes’s counsel acknowledged that any individualized determination was “scant.” To argue this was sufficient, Fuentes relies on State v. Gronnert, 122 Wn. App. 214, 225-26, 93 P.3d 200 (2004). There, although the court’s comments appeared to show a categorical denial of a drug offender sentencing alternative (DOSA), we found no abuse of discretion because other comments indicated, “The court exercised its discretion, determined that the program would not benefit either the defendant or the community, and denied the request for DOSA.” Gronnert, 122 Wn. App. at 226. But our Supreme Court has held that the categorical refusal to consider a statutorily authorized sentencing alternative when requested is reversible error. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). From context, it is clear that Fuentes’s case involves a categorical refusal to consider restitution to an insurance provider.

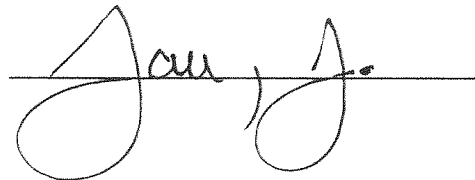


order the \$1,600 amount originally ordered to be paid to the insurance provider.

Even if we considered these statements by the court as a finding rather than a “comment,” a “guess,” or an “opinion,” any such finding is directed only to Fuentes’s present ability to pay. But as discussed above, this obligation is relieved only if the juvenile reasonably satisfies the court that he or she is unable to make full or partial payment to the insurance provider over a 10-year period. We conclude the court erred when it applied a standard found nowhere in the restitution statutes.<sup>7</sup>

### CONCLUSION

Because the court’s refusal to impose restitution for loss incurred by the insurance provider is based on impermissible general practice and mistaken legal standard, we reverse and remand for proceedings consistent with this opinion.



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<sup>7</sup> Fuentes and amicus assert that one of the statute’s purposes is to prevent juvenile impoverishment. Before the current statutory language was added to the 2004 senate bill, there was testimony in support of providing discretion to the court to avoid a “two-tiered system of justice” and to provide “poor kids the same opportunities.” The Final Bill report merely states, “Judges are given discretion to relieve a juvenile offender of an obligation to pay restitution to an insurance provider if the juvenile does not have the means to pay and could not reasonably acquire the means to pay over a ten-year period.” Final B. Rep. Engrossed Substitute S.B. 6472, at 2, 58th Leg., Reg. Sess. (Wash. 2004).

Because RCW 13.40.190(1)(g) unambiguously authorizes a court to relieve a juvenile’s obligation to pay restitution to an insurance provider upon a necessary showing by the juvenile that he or she is unable to make full or partial restitution over a 10-year period, we decline to address the parties’ various legislative intent and policy contentions. State v. Ollens, 89 Wn. App. 437, 442, 949 P.2d 407 (1998) (“When construing an unambiguous statute we look to the wording of the statute, not to outside sources such as legislative intent.”).

67804-3-1/10

WE CONCUR:

Edenfor, J.

Cox, J.