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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39903
	)	
v.	)	WASHINGTON COUNTY
	)	NO. CR-11-1049
DONALD LEONARD HOUSER,	)	
	)	APPELLANT'S BRIEF
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

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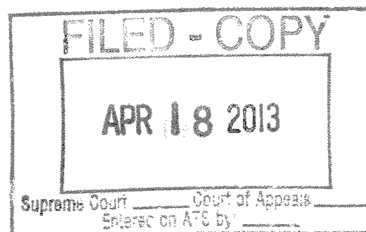

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STATEMENT OF THE CASE

Nature of the Case

Donald Houser was found guilty by a jury of aggravated assault. The victim, his younger brother Douglas "Doogie" Houser,[1] petitioned the district court for a restitution award for his wages for various days. While the district court did not grant the entirety of his request, it did provide awards for one day that Doogie took off because he was emotionally distressed, as well as for several days where Doogie made the choice to attend court hearings rather than go to work. His employer told him that each such decision would require him to take a full day off work. These awards are not authorized by the restitution statute, I.C. § 19-5304, and therefore, should be vacated.

Statement of the Facts and Course of Proceedings

The State charged Mr. Houser with aggravated assault, alleging he threatened Doogie by pulling a knife on him. (R., p.28.) Mr. Houser exercised his right to a jury trial. (*See, e.g.,* R., pp.63-80.) Despite the testimony of numerous witnesses who had seen Mr. Houser on the day in question and affirmatively testified that he was not wearing the knife identified by Doogie (*see, e.g.,* Tr., Vol.2, p.151, Ls.2-21)[2], the jury found Mr. Houser guilty of the offense. (R., p.88.) The district court sentenced Mr. Houser to a unified sentence of five years, with two years fixed. (R., pp.99-100.)

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[1] To promote clarity, Donald Houser will be referred to as "Mr. Houser" and his brother will be referred to as "Doogie."

[2] The transcripts in this case are contained in four independently bound and paginated volumes. To promote clarity, the volume containing the Motion in Limine hearing held on January 23, 2012, *et al.*, will be referred to as "Vol.1." The volume containing the trial proceedings from February 13 and February 14, 2012, will be referred to as "Vol.2." The volume containing the April 23, 2012, sentencing hearing will be referred to as "Vol.3." The volume containing the transcript from the August 31, 2011, bond reduction hearing will be referred to as "Vol.4."

Mr. Houser filed a timely Notice of Appeal from the judgment of conviction. (R., pp.105-06.)

Doogie also filed an affidavit for restitution in the amount of $1,102.40.[3] (Augmentation – Affidavit for Restitution.) He attached a letter to that affidavit from his employer, which indicated that Doogie had missed 106 hours of work due to the incident with Mr. Houser and that Doogie was paid $10.40 per hour. (Augmentation – Affidavit for Restitution.) At the restitution hearing, Doogie presented another document in which he broke down his request by each day of work he missed and the number of hours missed that day.[4] (Tr., Vol.1, p.168, Ls.14-17.) That document was identified as State's Exhibit 1 and was admitted into evidence. (Tr., Vol.1, p.168, L.18 - p.169, L.18.)

The district court only awarded the amounts requested by Doogie for August 22, August 23, 2011, August 31, 2011, September 6, 2011, September 12, 2011, November 14, 2011, December 12, 2011, January 23, 2012, February 14, 2012, and February 15, 2012.[5] (Tr., Vol.1, p.187, L.6 - p.188, L.9.) Accordingly, it entered an

---

[3] The district court initially entered a restitution order for that amount. (R., pp.96-97.) Mr. Houser filed a timely objection to that order and the matter was scheduled for a hearing. (R., pp.109-10.)

[4] According to Doogie, his work schedule changed based on the season, meaning that for some of the dates in question, he was scheduled for a ten-hour shift, while on other dates, he was only scheduled for an eight-hour shift. (Tr., Vol.1, p.175, Ls.9-13.)

[5] Doogie also tried to claim restitution for a hearing held on September 26, 2011, in regard to a related civil protection order case in which Mr. Houser's wife filed for a protection order against Doogie as a result of these same events. (Augmentation – State's Exhibit 1; Tr., Vol.1, p.174, L.20 – p.175, L.4.) Doogie admitted that those proceedings were not actually part of Mr. Houser's criminal case. (Tr., Vol.1, p.179, Ls.3-14.) The district court did not award that requested restitution. (Tr., Vol.1, p.187, Ls.24-25.) He also claimed restitution for August 24, 2011, and August 25, 2011, because Doogie was claiming restitution on those dates as a result of being "Emotionally Shaken" and sore. (Augmentation – State's Exhibit 1; Tr., Vol.1, p.171, L.20 - p.172, L.12.) The district court did not award restitution for those two dates either, holding that "if there was any kind of physical discomfort, it wasn't a result of the charged conduct in this case, and I'm not allowed to consider emotional distress." (Tr., p.187, Ls.17-22.)

amended restitution order for $936.00. (R., pp.113-14.) However, Mr. Houser had challenged most of those awards on several grounds. First, as to the August 22, 2011, claim, Mr. Houser had requested restitution for his wages that day because he was "Emotionally Shaken." (Augmentation – State's Exhibit 1.) Doogie added that he had also taken the day off because he was "too sore" to perform his duties. (Tr., Vol.1, p.172, Ls.11-12.) Mr. Houser challenged that claim because the restitution statute did not authorize awards for emotional distress damages and, because no contact had been made during the relevant encounter,[6] the soreness could not be attributed to Mr. Houser's culpable actions (pulling of a knife as a threat to do harm). (Tr., Vol.1, p.183, L.13 - p.184, L.16.) The district court, however, found that his assertion that he was emotionally distressed because Mr. Houser had not yet been arrested to be reasonable, and so ordered an award for that date. (Tr., Vol.1, p.187, Ls.6-10.)

Mr. Houser had challenged the awards for August 23, 2011, August 31, 2011, September 6, 2011, September 12, 2011, November 14, 2011, December 12, 2011, and January 23, 2012, based on the fact that Doogie's presence was not required at those hearings and they only took a very small portion of the day, so he would have otherwise been able to return to work on those days. (Tr., Vol.1, p.182, L.6 - p.183, L.10.) Doogie's explanation of why he did not return to work was that he had to drive twenty-three miles each way from his job site,[7] so his employer told him if he was going

[6] The State presented evidence of a confrontation which occurred at Mr. Houser's mother's house earlier in the day, but which had no bearing on whether Mr. Houser threatened Doogie with a knife at Doogie's house at a different time. (*See, e.g.,* Tr., Vol.2, p.82, Ls.10-19.)

[7] Of interesting note, though not presented to the district court, is the fact that Google Maps estimates the distance from the Washington County Courthouse in Weiser to Doogie's place of employment (*see* Augmentation – Letter from Chet Slyter accompanying Affidavit of Restitution) to be only eleven and one-half miles. Google Maps, http://maps.google.com/maps?hl=en&tab=wl (requesting driving directions from

to those hearings, he should just take the entire day off. (Tr., Vol.1, p.173, Ls.8-20.) The minutes of those hearings indicate that they took seven minutes (R., p.16), four minutes (R., p.21), ten minutes (*see* R., pp.25-26), seventeen minutes (R., p.31), four minutes (R., pp.37-38), six minutes (R., p.43), and eight minutes (R., p.48) respectively.[8] Mr. Houser did not object to the award of full day's wages for Doogie's appearance at the trial on February 14, 2012, and February 15, 2012. (Tr., Vol.1, p.183, Ls.11-12.) He also did not object to four other, unattributed hours of wages. (*See* Tr., Vol.1, p.184, Ls.17-18 (indicating no objection to an award of twenty hours' worth of wages); Augmentation – State's Exhibit 1 (indicating the times claimed for the trial dates were eight hours each).

Doogie also admitted that his presence was not required on these dates, and he only attended so as "to keep up to date on the hearings." (*See, e.g.,* Tr., Vol.1, p.178, L.19 - p.179, L.2.) Defense counsel argued that, since Doogie's presence was not required, the decision to be present at the hearings was optional, and therefore, not claimable as restitution. (*See, e.g.,* Tr., Vol.1, p.182, Ls.6-17.) Defense counsel also argued that any restitution award should be limited to just the time that Doogie actually spent in the hearing. (*See, e.g.,* Tr., Vol.1, p.182, L.19.) However, the district court

"256 East Court Street Weiser, ID 83672" to "Thousand Springs Ranch, 1860 U.S. 95, Weiser, ID 83672") (last accessed January 16, 2012) (copy of image of map on file with counsel).

[8] Accordingly, the record indicates Doogie would have spent a total of fifty-six minutes in all these hearings. He indicated, however, that on some occasions, he might have spent up to one hour at the courthouse on those dates. (*See, e.g.,* Tr., Vol.1, p.177, L.24 - p.178, L.2 (admitting spending only one hour at the courthouse on August 31, 2011); Tr., Vol.1, p.178, Ls.7-14 (admitting to spending only one-half hour in the courtroom on September 6, 2011).) Contrarily, as to the hearing on November 14, 2011, Doogie could not even affirmatively remember attending that hearing, nor could he dispute defense counsel's assertion that other people could not remember him being present on that date. (Tr., Vol.1, p.179, L.23 - p.180, L.4.)

rejected those arguments and awarded restitution for a full day's wage on all those dates, as well as for August 22, 2011. (Tr., Vol.1, p.187, L.6 - p.188, L.9.)

Mr. Houser filed a timely amended Notice of Appeal following the district court's amended restitution order. (R., pp.116-17.)

ISSUE

Whether the district court exceeded its statutory authority when it ordered Mr. Houser to pay restitution for losses which were not the result of his criminal conduct, and for losses which were claimed for emotional distress.

ARGUMENT

The District Court Exceeded Its Statutory Authority When It Ordered Mr. Houser To Pay Restitution For Losses Which Were Not The Result Of His Criminal Conduct, And For Losses Which Were Claimed For Emotional Distress

A. Introduction

This Court should vacate the restitution award in this case because the awards made are not authorized by the restitution statute. The award improperly covers losses which were not caused by Mr. Houser's culpable actions, but rather, were due to optional choices made by Doogie. Restitution only allows for recoupment of losses directly and proximately caused by a defendant's culpable actions, and losses due to optional choices are not so caused. The award also includes losses for emotional distress, which is forbidden by Idaho law. Because of these errors, this Court should vacate the restitution award in this case, or alternatively, remand the case for a proper calculation of restitution.

B. There Is No Statutory Authority For The Damages Not Caused By Mr. Houser's Criminal Conduct, Notably, The Wages Lost Because Of Doogie's Optional Choice To Attend Hearings Rather Than Go To Work

Restitution under the Idaho Code permits the court to "order a defendant found guilty of any crime which results in an economic loss to the victim to make restitution to the victim."[9] I.C. § 19-5304(2). The definition of economic loss does specifically include "lost wages." I.C. §19-5304(1)(a). A "victim" is "a person or entity, who suffers

[9] However, as will be discussed *infra*, to make an award for any of the listed economic losses, the loss must be proximately caused by the defendant's culpable action, and Mr. Harper is asserting that many of the lost wages claimed in this case were not proximately caused by his culpable actions.

economic loss or injury *as the result of the defendant's criminal conduct.*"[10] I.C. § 19-5304(1)(e)(i) (emphasis added). "[A] victim may be compensated for losses or expenses incurred in attending the restitution hearing and other criminal proceedings."[11] *State v. Parker*, 143 Idaho 165, 167 (Ct. App. 2006). However, in order to get such awards, the loss must still be caused by the defendant's criminal conduct. I.C. § 19-5304(1)(e)(i); *see, e.g., State v. Richmond*, 137 Idaho 35, 37 (Ct. App. 2002). "Criminal conduct" is limited only to those actions for which the defendant is found guilty. *State v. Shafer*, 144 Idaho 370, 373 (Ct. App. 2007). In some cases in this area, the term "culpable act" is substituted for "criminal conduct." *See e.g. State v. Lampien*, 148 Idaho 367, 374 (2007). A defendant may be ordered to pay additional restitution if he agrees to pay such restitution as part of a plea deal. *Shafer*, 144 Idaho at 373 (citing I.C. § 19-5304(9)). A determination of restitution by the trial court is reviewed for abuse of discretion. *Richmond*, 137 Idaho at 37.

To order restitution without an agreement by the parties, a court must have statutory authority permitting the order. *Id.* Idaho statutes limit the court's authority in this respect to only the damages caused by the conduct for which the defendant has been convicted. *Id.* at 38 (citing *Hughey v. United States*, 495 U.S. 411, 420 (1990)); *see also Shafer*, 144 Idaho at 372; *State v. Schultz*, 148 Idaho 884, 886-87 (Ct. App. 2008); *State v. Aubert*, 119 Idaho 868, 870 (Ct. App. 1991), *overruled on other grounds by State v. Dorsey*, 126 Idaho 659, 662 (Ct. App. 1995). Furthermore, economic loss is limited to only the "necessary expenses or losses that the victim incurred in order to

[10] There are other definitions of "victim" under this section which are inapplicable to this case. *See* I.C. § 19-5304(1)(e).

[11] The term "must" establishes a mandatory duty to act in a certain manner, whereas "may" would authorize, but not require, the proscribed action. *Rife v. Long*, 127 Idaho 841, 848 (1995).

address the consequences of the criminal conduct. It does not follow, however, that restitution may be ordered . . . for *any* out-of-pocket expense that the victim would not have incurred but for the defendant's crime." *Parker*, 143 Idaho at 168 (emphasis in original). Where the victim spends money that is not necessary to address the effects of the conduct, but rather, is merely optional costs incurred in response to the conduct, restitution is not authorized. *Id.*; *see also State v. Waidelich*, 140 Idaho 622, 624 (Ct. App. 2004) (holding that the victim's optional decision to increase the protection to her property was not a result of the defendant's criminal conduct of burglary, and therefore, those costs were not recoverable as restitution); *State v. Card*, 146 Idaho 111, 114 (Ct. App. 2008) (holding optional medical treatments, which had not shown to be necessary to treat the injuries caused by the defendant's criminal conduct, were not properly recoverable as restitution).

To determine whether restitution is authorized under the statute, Idaho employs the tort law causation analysis. *Lampien*, 148 Idaho at 374; *State v. Nienburg*, 153 Idaho 491, 495-96 (Ct. App. 2012), *reh'g denied*. Causation has two parts: actual cause and proximate cause. *State v. Corbus*, 150 Idaho 599, 602 (2011). Actual cause is determined using the "but for" test. *Id.* On the other hand, proximate cause is determined by using the "reasonably foreseeable" test. *Id.* The reasonably foreseeable test requires the court to determine "whether the injury and manner of occurrence are 'so highly unusual . . . that a reasonable [person], making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected the injury to occur.'" *Lampien*, 148 Idaho at 374 (quoting *Cramer v. Slater*, 146 Idaho 868, 875 (2009)). When the injury and manner of occurrence are so highly unusual that they are not reasonably foreseeable, they constitute an intervening,

superseding cause. An intervening, superseding cause is "an independent act or force that breaks the causal chain between the defendant's culpable act and the victim's injury." *Id.* It replaces the defendant's act as the proximate cause and relieves him of liability, so long as the intervening, superseding cause is unforeseeable and extraordinary. *Corbus*, 150 Idaho at 602.

In this case, there were several losses claimed by Doogie and for which a restitution award was entered that were not caused by Mr. Houser's culpable act, but rather, were optional costs. For example, Mr. Houser challenged the claims Doogie made for the days he attended court but was not required to be there. (Tr., Vol.1, p.182, L.4 - p.184, L.18.) Such losses, unlike the losses he incurred for February 14, 2012, and February 15, 2012, when he testified at the trial, were not necessary to address the consequences of Mr. Houser's culpable acts. *Compare State v. Russell*, 126 Idaho 38, 39 (Ct. App. 1994) (holding a victim may claim lost wages for the days he was required to be in court and testify about the losses); *State v. Doe*, 140 Idaho 873, 880-81 (Ct. App. 2004), *abrogated on other grounds recognized by State v. Hooper*, Not Reported in P.3d, Docket Number 31025, p.2 n.3 (Ct. App. 2006) (holding that the parents of a victim who had to accompany their child to hearings could recover wages for those losses, particularly since the defendant did not cross-examine them about their calculations in that regard); *State v. Olpin*, 140 Idaho 377, 379 (Ct. App. 2004) (allowing restitution for the wages of employees who had to stop their normal work to investigate the extent of the impact of the defendant's actions on the corporate victim and who provided testimony in court about those damages). Notably, by his own admission, Doogie was not subpoenaed to be at the hearings held on September 6, 2011, (Tr., Vol.1, p.174, Ls.2-10), and December 12, 2011, (Tr., Vol.1,

p.180, Ls.5-14). He also admitted that he was either not required, or could not remember being required, to be at the hearings on September 12, 2011, (Tr., Vol.1, p.178, Ls.19-25) and January 23, 2012, (Tr., Vol.1, p.180, Ls.15-17), but rather wanted to be there so as to keep tabs on the court schedule for the case.[12] (*See, e.g.*, Tr., Vol.1, p.180, Ls.9-11.)

Furthermore, apart from testifying that he could not remember being required to be present for the hearing on November 14, 2011, Doogie could not affirmatively testify that he even attended that hearing, nor could he refute defense counsel's representation that other people did not remember him being present that day. (Tr., Vol.1, p.178, L.16 - p.179, L.4.) He also did not offer any testimony in regard to the bond hearing held on August 31, 2011, much less whether his presence was necessary at that time, and yet he claimed ten hours of lost wages. (*See generally* Tr., Vol.4; Tr., Vol.1, p.167, L.23 - p.181, L.23.) The record also belies Doogie's assertion that he had to be at the magistrate court arraignment hearing on August 23, 2011, so as to testify in regard to bond (though he admitted he was not certain that he had actually testified on that date, and not another date).[13] (Tr., Vol.1, p.177, Ls.11-19.) The minutes from the August 23, 2011, hearing do not indicate any testimony given by any witness, and in regard to bond, only indicated that the prosecutor made argument. (R., p.16.)

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[12] This goal could have also been accomplished by simply reviewing the Idaho judiciary's online repository, rather than taking a full day off work to attend the short hearings. *See* Idaho State Judiciary, "Idaho Supreme Court Data Repository," https://www.idcourts.us/repository/start.do.

[13] Mr. Houser was called to testify at that hearing. (Tr., Vol.4, p.5, Ls.14-22.) He was the only person to offer testimony at that hearing, as the State did not have any witnesses to offer testimony. (Tr., Vol.4, p.10, L.25 - p.11, L.1; *see generally* Tr., Vol.4.) Neither the transcript nor the minutes from that hearing indicate that Doogie was present at that hearing. (*See generally* R., pp.21-22, Tr., Vol.4.)

Therefore, by the evidence given by Doogie himself, his attendance at the hearings on August 31, 2011, September 6, 2011, September 12, 2011, November 14, 2011,[14] December 12, 2011, and January 23, 2012, was optional.[15] As such, the expenses claimed for his optional choices on those dates were not caused by Mr. Houser's culpable conduct, and therefore, they should be vacated from the restitution order. *See Parker*, 143 Idaho at 167-68; *Waidelich*, 140 Idaho at 624; *Card*, 146 Idaho at 114-17. And even if losses of Doogie's time in the courtroom at those hearings were caused by Mr. Houser's culpable actions, the fact that Doogie took the remainder of the day off was not, in any way, caused by Mr. Houser's culpable act. In that case, the award should only reflect the time that Doogie was in the courtroom for the actual hearing, not the entire day.

Notably, many of those hearings actually took very little time. For example, on August 31, for which the district court awarded ten hours of wages, only one hour of Doogie's day, by his own admission, was spent in the courtroom.[16] (Tr., Vol.1, p.177, L.24 - p.178, L.2; Augmentation – State's Exhibit 1 (Doogie's itemized claim for restitution).) He also received ten hours of wages for his time on August 23, 2011, for the magistrate court arraignment hearing. (Tr., Vol.1, p.187, Ls.11-16; Augmentation –

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[14] As Doogie could not testify that he had actually been present at the November 14, 2011, hearing, there is no evidence demonstrating that this loss was, in any way, related to Mr. Houser's culpable conduct. Therefore, there is no statutory basis at all for the award for Doogie's wages for that day. *See* I.C. § 19-5304. As such, it, at least, should be vacated.

[15] While Doogie, as the victim of the crime, may have had the right to attend these hearings, IDAHO CONST. Art.I, § 22; I.C. §19-5306, his exercise of that right was not required, particularly when his employer told him that choosing to do so would result in a loss of a full day's wages. The restitution statute does not provide for recovery for losses caused by the optional exercise of a right. *See* I.C. § 19-5304; *Parker*, 143 Idaho at 167-68; *Waidelich*, 140 Idaho at 624; *Card*, 146 Idaho at 114-17.

[16] The hearing itself only took thirteen minutes. (R., p.21.)

State's Exhibit 1.) That proceeding took seven minutes. (R., p.16.) Again, Doogie received restitution for ten hours for September 6, 2011. (Tr., Vol.1, p.187, L.25 – p.188, L.5; Augmentation – State's Exhibit 1.) However, he only spent, by his own admission, one-half of an hour in the courtroom on that day. (Tr., Vol.1, p.178, Ls.7-14.) The hearing itself only lasted approximately ten minutes. (*See* R., pp.25-26.)

The same is true for September 12, 2011, when Doogie attended Mr. Houser's felony arraignment, taking the whole day off work "to keep up to date on the hearings." (Tr., Vol.1, p.178, L.19 - p.179, L.2; Augmentation – State's Exhibit 1.) However, the minutes of that hearing reflect that Mr. Houser's felony arraignment took a total of seventeen minutes. (R., p.31.) Doogie claimed eight hours of wages for December 12, 2011, and January 23, 2012, when he claimed to have attended hearings to keep tabs on the court's schedule. (Tr., Vol.1, p.180, Ls.5-17.) Those hearings took six minutes and eight minutes, respectively. (R., pp.43, 48.) Yet, for those fourteen minutes of his time, Doogie received an award for sixteen hours of wages. (Tr. Vol.1, p.187, L.25 - p.188, L.5.)

Therefore, as evidenced by the record and Doogie's own admissions, most of these hearings took less than one hour, meaning Doogie might have been personally able to work for a portion of the day. The only justification for his decision to not return to work was the fact that Doogie had to drive to and from the courthouse, and so his employer told him to take the remainder of those days off. (Tr., p.173, Ls.8-16.) However, the employer's permission to take the entire day off constitutes an intervening, superseding cause in regard to whether Mr. Houser's actions caused those losses – it was not foreseeable that the employer would not require a partial day of work, particularly since Doogie was not spending extraordinary amounts of time in the

courthouse. As such, those losses were not proximately caused by Mr. Houser, and thus, not properly awarded as restitution. *See Corbus*, 150 Idaho at 602. Additionally, as explained *supra*, Doogie did not have to attend those hearings, and so his choice to miss work, allowed by his supervisor, may not be awarded under the restitution statute. *See* I.C. § 19-5304.

Cumulatively, Doogie received a restitution award for sixty-four *hours* of his time in exchange for spending fifty-six *minutes* of actual time at various court hearings. Even Doogie's estimation of the total time he spent in the courtroom for some of these hearings reveals he would have only spent a few hours, all told, at these hearings, not full days. Therefore, the restitution awards for Doogie's wages on those dates were not authorized by the statute. Therefore, those portions of the restitution award should be stricken from the restitution order.[17]

C. There Is No Statutory Authority For The Damages For Emotional Distress

Notably, restitution may only be awarded for "economic loss," and that term includes "the value of property taken, destroyed, broken, or otherwise harmed, lost wages, and direct out-of-pocket losses or expenses, such as medical expenses resulting from the criminal conduct." *Nienburg*, 153 Idaho at 812 (quoting I.C. § 19-5304(1)(a)). Awards for less tangible damages, such as emotional distress damages, are expressly excluded by the restitution statute. *State v. Straub*, ___ Idaho ___, 2013 Opinion No.2, p.8 (January 7, 2013) (citing I.C. § 19-5304(1)(a)). As such,

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[17] Sixteen hours of wages were properly awarded for Doogie's time at Mr. Houser's trial. (*See* Augmentation – State's Exhibit 1.) Based on the implication of defense counsel's assertion that twenty hours of wages were all that were appropriate, Doogie spent a total of four hours at those hearings. (*See* Tr., Vol.1, p.184, Ls.17-18.) For those twenty hours, then, the restitution award should have been only $208.00. (*See* Augmentation – State's Exhibit 1.)

restitution may not be awarded for emotional distress, even if the distress was "rationally related to the crime." *State v. Gonzales*, 144 Idaho 775, 778-79 (Ct. App. 2007). Doogie claimed thirty hours of lost wages for August 22, 2011, August 24, 2011, and August 25, 2011, because he was "Emotionally Shaken."[18] (Augmentation – State's Exhibit 1.) The district court disallowed restitution awards for August 24, 2011, and August 25, 2011. (Tr., Vol.1, p.187, Ls.17-22.) However, it did allow for ten hours of wages for August 22, 2011. (Tr., Vol.1, p.187, Ls.6-10.) The only difference between Doogie's claim for emotional distress damages on August 22, 2011, was that Mr. Houser was not in custody on August 22, 2011. (Augmentation – State's Exhibit 1.) The district court found that to be "reasonable," and so ordered the award for August 22, 2011. (Tr., Vol.1, p.187, Ls.6-10.) However, the statute is clear: emotional distress damages, suffered for whatever reason, no matter how closely related to the culpable action, and no matter how reasonable, are not recoverable as restitution. I.C. § 19-5304(1)(a); *Straub*, 2013 Opinion No.2, p.8; *Gonzales*, 144 Idaho at 778-79. Therefore, the award for Doogie's wages on August 22 should be vacated as well.

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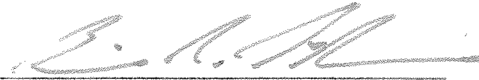
[18] He also claimed that he was "too sore to lift or bend or any of that." (Tr., p.172, Ls.11-12.) However, at the trial, he admitted on cross-examination that he could not remember ever being touched during the incident from which the criminal charge arose. (Tr., Vol.2, p.99, Ls.13-15.) As such, as the district court found, there is no way that Mr. Houser's culpable conduct could have caused Doogie to be sore, and so restitution on that basis is not authorized by the restitution statute. (Tr., Vol.1, p.187, Ls.17-22.)

CONCLUSION

Mr. Houser respectfully requests this Court vacate the restitution order in his case. Alternatively, he requests that his case be remanded to the district court for a new restitution hearing.

DATED this 18th day of April, 2013.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of April, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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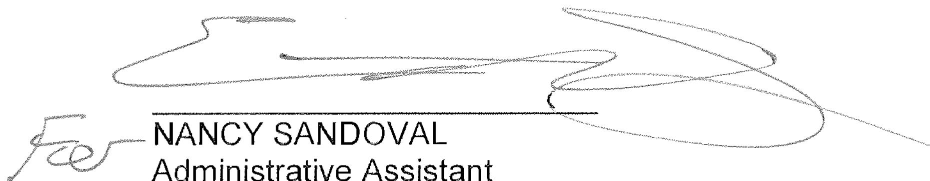

NANCY SANDOVAL
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BRD/tmf