

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JOSE IXCOLIN-OTZOY,
Defendant-Appellant.

Washington County Circuit Court
C140351CR; A157191

Thomas W. Kohl, Judge.

Argued and submitted February 23, 2016.

Anne Fujita Munsey, Deputy Public Defender, argued the cause for appellant. With her on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Michael S. Shin, Assistant Attorney General, argued the cause for respondent. With him on the briefs were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before Ortega, Presiding Judge, and Lagesen, Judge, and Garrett, Judge.

ORTEGA, P. J.

Affirmed.

ORTEGA, P. J.

Defendant challenges an award of restitution to CARES Northwest and the Department of Human Services (DHS) for the costs of a sexual abuse evaluation performed by CARES on defendant's 15-year-old victim. On appeal, defendant argues that the costs of the evaluation may not be awarded as restitution under ORS 137.106 because an entity does not suffer "verifiable monetary losses" for investigatory expenses that are incurred as part of the entity's "ordinary operating expenses." The state contends that defendant's appellate argument differs fundamentally from the limited objection that he made to the trial court and therefore is not properly before us. Alternatively, the state argues that the trial court properly awarded restitution because the costs of the evaluation qualify as "economic damages" under ORS 137.106. Because we conclude that defendant failed to adequately preserve the argument that he makes on appeal, we affirm.

We begin with a brief overview of restitution to set the context for our preservation analysis. The restitution statute at issue in this case, ORS 137.106, provides, in relevant part:

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

Under that statute, "there are three prerequisites to an order of restitution: (1) criminal activities, (2) economic damages, and (3) a causal relationship between the two." *State v. Pumphrey*, 266 Or App 729, 733, 338 P3d 819 (2014), *rev den*, 357 Or 112 (2015). The state has the burden of proving by a preponderance of the evidence those prerequisites, including the "nature and amount" of the victim's economic damages. See *State v. Yocum*, 247 Or App 507, 512, 269 P3d

113 (2011), *rev den*, 352 Or 25 (2012) (discussing applicable standard of proof for the imposition of restitution).

As relevant here, “economic damages” are defined by statute as “objectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services ***.” See ORS 137.103 (2)(a) (the term “economic damages” “[h]as the meaning given that term in ORS 31.710, except that ‘economic damages’ does not include future impairment of earning capacity”); see ORS 31.710(2)(a) (defining “economic damages”). Further, although the statute does not state it explicitly, “economic damages” are limited to those monetary losses that “could be recovered against the defendant in a civil action arising out of the facts or events constituting defendant’s criminal activities.” *State v. Dillon*, 292 Or 172, 182, 637 P2d 602 (1981). Accordingly, monetary losses cannot be awarded as restitution if the record “discloses no facts giving rise to a theory of civil liability under which they could be recovered from [the] defendant.” *State v. Herfurth*, 283 Or App 149, 157, 388 P3d 1104 (2016), *rev den*, 361 Or 350 (2017) (quoting *State v. Wilson*, 193 Or App 506, 509, 92 P3d 729 (2004) (brackets in *Wilson*)).

With that background in mind, we state the relevant undisputed facts. Defendant pleaded guilty to third-degree rape and third-degree sodomy for his sexual abuse of the 15-year-old victim. Prior to defendant’s guilty plea, the victim was referred by DHS to CARES for a sexual abuse evaluation. After defendant pleaded guilty, the state asked the court to award restitution to CARES and DHS for the cost of that CARES evaluation.

At the beginning of the restitution hearing, the state explained that it was seeking restitution for the “medical services” rendered by CARES at the evaluation. The state further explained that it would present evidence that the victim underwent a full physical examination and a videotaped interview that were “part of the typical evaluation” and “standard of care” that CARES conducts for alleged victims of sexual abuse. The state also indicated that it would introduce exhibits to demonstrate that the costs for the

victim's evaluation included \$449.19 that CARES received as reimbursement under the Oregon Health Plan from DHS, and \$3,189.81 in unreimbursed costs.¹

Before the state presented its evidence, defendant "briefly *** [laid] out the reason for the objection in this case." First, defendant asserted that the evaluation was "investigative in nature and should not be something that should be required as restitution." Second, defendant asserted that CARES conducted the evaluation for reasons other than his criminal activities, so "the but-for relationship is not necessarily there."

After defendant expressed his objections, the state called a program manager at CARES as a witness. He testified that CARES was a department of Legacy Emanuel Hospital and that the evaluation of the victim was the "typical evaluation at CARES Northwest" consisting of a "complete head-to-toe medical checkup" that was necessary to identify "medical concerns that maybe haven't been addressed over the years." He explained that the evaluation looks "at the whole child to address any medical issues the child might have" and that the specific evaluation of the victim in this case was "medically necessary." He also testified that CARES is a "medical program" that does not take direction or orders from law enforcement, DHS, or the District Attorney, and that, although they collaborate with law enforcement and child protective services, CARES is "first and foremost" a medical program.

Defendant cross-examined the program manager, focusing on DHS's referral of the victim to CARES and the presence of police officers during parts of the evaluation.

In closing, the state explained that restitution was appropriate because CARES suffered economic damages that were causally connected to defendant's crimes. The state asserted that CARES, "like every other medical evaluator," is entitled to seek restitution for "medical expenses"

¹ The state introduced as an exhibit a letter from the Personal Injury Liens Unit of DHS that indicated that DHS had paid \$449.19 for the victim's outpatient treatment. In addition, the state introduced as an exhibit an "invoice" addressed to the district attorney from CARES that stated that the "total charges" were \$3,639.00 with a current balance of \$3,189.81.

that resulted from defendant's criminal actions. The state further argued that medical expenses are economic damages as that term is defined in the relevant restitution statutes, and that the evidence showed that the victim received medical services at CARES as a result of defendant's criminal activities. Therefore, the state concluded that, because CARES provided medical services to the victim as a result of defendant's criminal activities, the cost of the evaluation qualified as "economic damages" according to the statutory definition of that term.

In response, defendant argued that the evaluation served investigative purposes because two police officers were in the room during the evaluation, "very detailed questions" were asked of the victim about the allegations against defendant, and "[t]hat information was used during the prosecution of the case." Accordingly, defendant asserted to the trial court that "there is an investigation part of the CARES evaluation separate from the medical part." Separately, defendant argued that any cost of the medical exam that did not directly relate to the defendant's sexual abuse crimes (*e.g.*, the hearing test that was conducted as part of the medical exam) should not be included in any amount awarded as restitution because that part of the exam was not a result of defendant's criminal activities.²

At the end of the hearing, the court determined that the evaluation was "a whole body exam, head-to-toe, and because of defendant's conduct, sexually abusing this young girl, that he's responsible for that." That is, the court concluded that the evaluation was a medical service, and that CARES was entitled to restitution for the unreimbursed cost of the evaluation. Further, the court concluded that DHS was entitled to restitution for the amount it reimbursed CARES for payment under the Oregon Health Plan. The court entered a supplemental judgment to reflect the restitution, and in that judgment it concluded that DHS and CARES are "a victim for purposes of restitution and ha[ve] suffered recoverable economic damages as a result of the defendant's criminal activities." Defendant appeals the supplemental judgment that imposes restitution.

² Defendant does not renew his "but-for" causation argument on appeal.

We begin with preservation. To preserve an argument for appellate consideration, the party must provide the trial court with an explanation of his or her objection that is specific enough to afford the court the opportunity to analyze any alleged error. *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000). As a prudential matter, one purpose of the preservation rule is to allow the adversary to present its position and to permit the court to understand and avoid or correct the error. *Peiffer v. Hoyt*, 339 Or 649, 656, 125 P3d 734 (2005). The preservation rule also “fosters full development of the record, which aids the trial court in making a decision and the appellate court in reviewing it.” *Peeples v. Lampert*, 345 Or 209, 219-20, 191 P3d 637 (2008). As a pragmatic matter, “[w]hat is required of a party to adequately present a contention to the trial court can vary depending on the nature of the claim or argument; the touchstone in that regard, ultimately, is procedural fairness to the parties and to the trial court.” *Id.* at 220. Moreover, “[w]hether a party adequately presented a contention to the trial court varies depending on the nature of the claim or argument.” *State v. Wirfs*, 250 Or App 269, 273, 281 P3d 616, *rev den*, 352 Or 378 (2012). In this case, when we compare defendant’s objection and argument in the trial court with defendant’s appellate argument, we conclude that the purposes of the preservation rule were not met.

Beginning with defendant’s appellate argument, he contends that the trial court erroneously awarded restitution to CARES and DHS because, in doing so, the court awarded restitution for investigative costs that were part of CARES’s “ordinary operating expenses.” On its face, the legal theory underlying that argument is not entirely clear. However, the two cases that defendant relies on in his opening brief, *Wilson*, 193 Or App 506, and *Dillon*, 292 Or 172, provide some clarity to his appellate argument.

In *Wilson*, we examined whether costs incurred by the Department of Corrections’ (DOC) Fugitive Apprehension Unit for apprehending the defendant after he had escaped DOC custody were properly awarded as restitution. 193 Or App at 509. We concluded that DOC was statutorily required to exercise custody over incarcerated persons—including apprehending escaped prisoners—and, therefore,

that statutory requirement would prevent the defendant from incurring civil liability for the expense of returning him to custody. Because there were “no facts giving rise to a theory of civil liability under which [those costs] could be recovered from defendant,” restitution for those expenses was improper. *Id.*

In *Dillon*, a police officer shot the defendant after he had led officers on a high-speed chase and assaulted one of them. 292 Or at 174. The defendant received medical treatment for the gunshot that was paid for by DHS’s Adult and Family Services Division. The Supreme Court, noting that “[economic] damages”³ must be damages that could be recovered against the defendant in a civil action arising out of the facts or events constituting the defendant’s criminal actions, concluded that the record contained no facts giving rise to a theory of civil liability under which DHS could recover the defendant’s medical expenses from him. *Id.* at 182-83. Accordingly, restitution could not be awarded to DHS for the defendant’s medical expenses.

Defendant’s reliance on *Wilson* and *Dillon* supports an argument that the expenses incurred by CARES for the evaluation were investigatory expenses that are part of CARES’s “ordinary operating expenses,” and that the record disclosed no facts that gave rise to a theory of civil liability under which CARES could recover those costs from defendant. We take that to be defendant’s argument on appeal but, as explained below, that argument was not fairly presented to the trial court.

Rather, the parties presented what the trial court fairly understood to be a disputed factual issue as to whether the evaluation was medical or investigatory in nature. To review, the state began the hearing by asserting that it was

³ At the time the Supreme Court decided *Dillon*, under ORS 137.106(1), restitution was allowed for “pecuniary damages.” As explained in detail in [State v. Ramos](#), 358 Or 581, 590, 368 P3d 446 (2016), the legislature amended ORS 137.103 and ORS 137.106 in 2005 to update the nomenclature for damages, and, in the process, changed “pecuniary damages” to “economic damages.” See Or Laws 2005, ch 564, § 1. As noted in *Ramos*, the changes were intended “to modernize the labels used to describe the types of damages recoverable as restitution, but also intended to preserve the historical practice of permitting recovery of only what had formerly been known as ‘special’ damages, and ‘which a person could recover against the defendant in a civil action.’” *Id.*

seeking restitution for the medical services provided by CARES to the victim. Defendant briefly objected because the CARES evaluation was “investigative in nature.” After the state presented evidence as to the medical purposes of the evaluation, the state argued that CARES, as a “medical evaluator” could seek restitution for medical services it provided as a result of defendant’s criminal actions. Defendant’s only argument in response was that there was evidence that the evaluation had investigatory purposes, “so there is an investigation part of the CARES evaluation separate from the medical part.” Defendant never asserted in any manner the argument that investigative costs that are incurred as “ordinary operating expenses” fail to give rise to a theory of civil liability under which they could be recovered from defendant. Rather, in context, it appears that defendant’s argument to the trial court was focused on distinguishing the factual nature of CARES’s evaluation from “medical services” that are explicitly mentioned in the statutory definition of “economic damages.” See ORS 31.710(2)(a).

Accordingly, given the way the parties argued the restitution issue to the trial court, the trial court reasonably understood the issue to be whether, as a factual matter, the CARES evaluation was investigatory or medical in nature. The trial court’s ruling reflects as much—*i.e.*, the court’s decision appears to conclude as a factual matter that the evaluation was medical and therefore an appropriate basis for awarding restitution. Defendant’s appellate argument is significantly and fundamentally different from the argument he made to the trial court because, rather than evaluating the trial court’s determination that the evaluation was medical, defendant appears to be asking us to determine whether the record discloses facts that give rise to a theory of civil liability under which those costs could be recovered by CARES from defendant. That contention was not adequately preserved, and, accordingly, we decline to address it.

Affirmed.