STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2014 AP 1794 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD J. NELSON,

Defendant-Appellant.

Appeal from Judgment of Conviction and Order
Denying Postconviction Relief
Brown County Circuit Court
The Honorable William M. Atkinson, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

FARHEEN ANSARI

Wisconsin Bar No. 1063641
AF LAW
Post Office Box 8822
Madison, Wisconsin 53708
(608) 205-8016

AF@AFLawyer.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ISSUE PRESENTED

Does Wis. Stat. § 973.20 permit a court to hold a defendant responsible for emergency room bills submitted towards restitution for alleged injuries from batteries, when the defendant is ultimately acquitted of the batteries, but found guilty of disorderly conduct?

The circuit court answered affirmatively, holding that because the crime of disorderly conduct includes violent and abusive behavior, the restitution ordered was proper because it is attributable to the violent and abusive behavior of the disorderly conduct the defendant was convicted of. (R. 57:7-8; 43; App. 145-46, 147).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Nelson does not request oral argument and publication. The issue presented involves the application of settled law to the facts of the case.

STANDARD OF REVIEW

This Court reviews restitution orders under the erroneous exercise of discretion standard of review. *State v. Haase*, 2006 WI App 86, ¶ 5, 293 Wis. 2d 322, 716 N.W.2d 526, 528. Circuit courts have discretion in deciding the amount of restitution ordered and in determining whether a defendant's criminal activity was a substantial factor in causing any expenses for which restitution is claimed. *State v. Canady*, 2000 WI App. 87, ¶¶ 6, 12, 234 Wis. 2d 261, 610 N.W.2d 147; *State v. Behnke*, 203 Wis. 2d 43, 57-58, 553 N.W.2d 265, 272 (Ct. App. 1996).

When reviewing a circuit court's exercise of discretion, this Court examines the record to determine

whether the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated and rational process to reach a conclusion that a reasonable judge could reach. *Crawford County v. Masel*, 2000 WI App 172, ¶ 5, 238 Wis.2d 380, 617 N.W.2d 188. It follows that a circuit court erroneously exercises its discretion and is subject to reversal by this Court when it applies the wrong legal standard, or does not ground its decision on a logical interpretation of the facts. *Behnke*, 203 Wis. 2d at 58.

Whether a court's restitution order is authorized under a particular set of facts is a question of law that this Court reviews de novo. *State v. Lee*, 2008 WI App 185, ¶7, 314 Wis. 2d 764, 762 N.W.2d 431. Similarly, the construction of a statute is a question of law which this Court decides without deference to the trial court's determination. *State v. Rodriguez*, 205 Wis. 2d 620, 626, 556 N.W.2d 140, 142 (Ct. App. 1996).

STATEMENT OF THE CASE

This is an appeal from an order denying post-conviction relief in *State of Wisconsin v. Richard J. Nelson*, Brown County Case Number 2013-CM-06. (R. 57:7-8; 43; App. 145-46, 147). Nelson was charged with two counts of Battery, Domestic Abuse[1], in violation of Wis. Stat. §§ 940.19(1) and 968.075(1)(a), and one count of Disorderly Conduct, Domestic Abuse, in violation of Wis. Stat. §§ 947.01(1) and 968.075(1)(a). (R. 1:1-2; App. 101-102). The charges arose from an incident that occurred on the night of December 28, 2012, in which Nelson had an argument with his girlfriend Cynthia B.[2] at the apartment they shared. (R.

[1] In undersigned counsel's Postconviction Motion she mistakenly wrote Nelson was charged with and acquitted of one count of battery, instead of two counts. (*See* R. 40; App. 131-38). Both counts of battery arose out of the same incident, and the mistake does not affect the arguments made in the postconviction motion.

[2] *See* Petition 14-01 – Creation of 809.86, at http://www.wicourts.gov/srules/1401.htm. This pending rule prohibits

1:3-4; App. 103-104). Cynthia B. left the apartment and went to the hospital complaining of injuries from the incident. (*Id.*). A deputy was dispatched to the hospital, where Cynthia B. told him that Nelson had been intoxicated and upset with her for an email he had found written to her from another man. (*Id.*). Cynthia B. stated that she was out on their balcony when Nelson punched her twice in the face, once back inside he pushed her down to the ground twice, and then brought a knife into their bedroom while he attempted to talk to her about their relationship. (*Id.*).

The case proceeded to a one-day jury trial. (*See* R. 56). At trial the state presented the testimony of Cynthia B., her daughter who had picked her up from the apartment and taken her to the hospital, and the responding deputy. (R. 56:33-50, 64-69, 72-76). Nelson testified on his own behalf, denying the allegations against him and stating his relationship with Cynthia B. had been rocky prior to the night of the incident. (*See* R: 56:88-111). Nelson testified that Cynthia B. had left the email open on the computer for him to find. (R. 56:87-91). Nelson stated that after dinner he began to pack up his belongings to move out again, which agitated Cynthia B. (R. 56:87-91). Nelson testified that he told Cynthia B. he was moving out while they were out on the balcony, and as he turned to go back inside, she reached out to grab him. (R. 56:90-95). Nelson stated that Cynthia B. slipped and fell as she reached out to grab him, scratching his face in the process. (R. 56:90-95).

The jury found Nelson not guilty on the two counts of battery and guilty on the count of disorderly conduct. (R. 56:153-155; 30). The court proceeded to sentencing. (*See* R. 56:156-168; App. 113-124). The circuit court followed the state's recommendation and ordered eighteen months probation with sixty days of conditional jail time. (R. 56:167;

---

briefs from using a victim's full name; therefore undersigned counsel will err on the side of caution and refer to the complainant by first name and last initial only.

34; App. 124, 130). The court also ordered restitution, which included hospital bills from Cynthia B.'s visit to the emergency room, totaling $3,588.38. (*See* R. 56:162-167; App. 119-124). Over Nelson's[3] objections that the hospital bills came from the battery allegations he had been acquitted of, the court found that Cynthia B. incurred the expenses as a result of the disorderly conduct Nelson had been convicted of. (*See Id.*). Nelson timely filed a notice of intent to seek postconviction relief. (R. 33).

Nelson filed a postconviction motion seeking to vacate the medical bills from the restitution order, arguing the circuit court had erroneously exercised its discretion under Wisconsin's restitution statute. (*See* R. 40:1-8; App. 131-138). The court held a hearing on the motion at which Nelson[4] and the state provided oral argument. (*See* R. 57:1-8; App. 139-147). The circuit court denied the postconviction motion, stating the definition of disorderly conduct includes violent and abusive behavior; therefore the restitution was attributable to that behavior of the crime Nelson was convicted of. (R. 57:7-8; App. 145-46). Nelson appeals. (R. 44:1-2).

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Charges

The charges arose out of an incident that occurred on December 28, 2012, in which Nelson's then-girlfriend Cynthia B. accused him of punching her during an ongoing argument at their apartment. (R. 1:2-4; App. 103-104).

[3] Any reference to Nelson "objecting," "arguing," "filing," etc. (besides his in-trial testimony) refers to Nelson's trial counsel, and later undersigned counsel, acting on his behalf.
[4] By undersigned counsel.

The hospital called 911 in reference to a female subject in the emergency room claiming to have been involved in a domestic disturbance. (*See* R. 1; App. 101-104). The female subject, identified as Cynthia B., told the responding deputy her intoxicated boyfriend, identified as Nelson, had punched her twice in the face, pushed her down onto the ground twice, then brought a steak knife into their bedroom while attempting to discuss their relationship. (R. 1:3; App. 103). The deputy initially observed dried blood on the right side of Cynthia B.'s mouth, and swelling and redness on her left cheek bone. (*Id.*). Cynthia B. then left the hospital room to take a computerized axial tomography (CAT) scan. (R. 1:4; App. 104). When she returned thirty minutes later, the deputy noted the injuries were no longer noticeable and he therefore did not photograph them. (R. 1:4; App. 104). The deputy stated due to his extremely busy shift he was unable to contact Nelson that night. (*Id.*).

Evidence presented at trial

Cynthia B. Testimony

At the one-day jury trial held on October 30, 2013, Cynthia B. testified that after she came home from work on December 28, 2012, she found a note on the computer written to her from Nelson stating he was upset about emails he had seen that he wanted removed. (R. 56:36-37). Cynthia B. stated the emails were written by her to a person she had been dating a year before she met Nelson. (R. 56:37). Nelson was at the grocery store when Cynthia B. found the note, and they began texting back and forth about the emails. (R. 56:37-38).

Later that evening, after having dinner with Nelson, Cynthia B. testified that she took some prescribed pain medication for her knee that made her groggy. (R. 56:39). She laid down on the couch and eventually fell asleep. (*Id.*) Cynthia B. stated she awoke with Nelson angrily yelling her name; she got up and subsequently went out onto their

balcony to smoke a cigarette. (R. 56:39, 41). Cynthia B. testified that Nelson followed her onto the balcony, grabbed her, turned her around, and punched her in the face; then Nelson pushed her up against the balcony railing and threatened to push her over the edge. (R. 56:41-42). Cynthia B. testified the next thing she remembered was being back in the living room, with Nelson pushing her down to the ground twice, then picking her up and walking her into their bedroom. (R. 56:45). Cynthia B. testified Nelson told her to stay on the bed while he went into the kitchen and returned with a steak knife. (*Id.*). Cynthia B. stated she testified she asked Nelson what the knife was for and he replied that it was for either him or for her. (*Id.*). Cynthia B. testified that Nelson then calmed down and sat on the bed, saying they were going to sit and talk this out. (*Id.*). Cynthia B. testified that shortly after this, she asked Nelson to retrieve her cell phone for her, then texted her daughter Victoria Morgan to pick her up. (R. 56:50).

Victoria Morgan Testimony

The state's next witness was Morgan, who testified that her mother had some blood on her left cheek and looked like she had been crying when Morgan arrived to pick her up. (R. 56:66). Morgan stated that she did not see any bruising, but did see some swelling on Cynthia B.'s face. (*Id.*). Morgan testified that she then drove Cynthia B. to St. Mary's Hospital. (R. 56:67).

Officer Snover Testimony

The state's last witness was Officer Alan Snover, who met with Cynthia B. after she had been admitted into St. Mary's Hospital. (R. 56:72-73). Officer Snover testified he observed a little bit of dried blood on the right side of Cynthia B.'s mouth and her left cheekbone area as red and appeared to be swollen. (R. 56:74). The state asked Officer Snover given his experience as a law enforcement officer, if Cynthia B.'s

injuries were consistent with she said happened to her. (*Id.*). Officer Snover replied that her injuries appeared to be consistent with someone getting hit in the face. (R. 56:76). On cross, Nelson asked Officer Snover if he took any photographs of the injuries, and if he had followed up by asking any of Cynthia B. and Nelson's neighbors if they had heard the altercation. (R. 56:77-78). Officer Snover replied that he had not photographed Cynthia B. and he had not followed up with any neighbors or with Nelson. (R. 56:77-79).

Richard Nelson Testimony

After the state rested, Nelson testified on his own behalf. (R. 56:82-97). Nelson testified that Cynthia B. had left the emails on the computer for him to find; he saw the emails as soon as he opened his laptop up that morning after dropping Cynthia B. off at work. (R. 56:87). Nelson testified that he left Cynthia B. a note asking her why she would do that, and later while he was grocery shopping the two of them texted about the emails. (R. 56:87).

Nelson testified that later in the evening Cynthia B. became aggravated when he woke her up to tell her to go sleep on the bed instead of the couch. (R. 56:89-91). Nelson stated shortly after, Cynthia B. became more upset upon seeing that Nelson had begun packing up his clothes again. (R. 56:90-91). Both parties had previously testified that Nelson had briefly moved out of the apartment after an argument the week before. (R. 56:54-55; 88). Nelson stated that he went out into the balcony to smoke a cigarette after he finished packing, and Cynthia B. followed him outside. (R. 56:92). Nelson testified that while out on the balcony he told Cynthia B. he was leaving this time and not coming back. (*Id.*). Nelson testified that as he turned to walk back into the apartment, Cynthia B. reached out and grabbed at him, scratching him in the process. (R. 56:92). Nelson testified that as he continued to walk into the apartment, Cynthia B.

fell down onto the floor of the balcony. (R. 56:93-94). Nelson stated he helped Cynthia B. up and back into the apartment. (*Id.*). Nelson introduced his booking photograph, taken the following morning after his arrest, as an exhibit. (R. 56:95; 29; App. 105). He testified that the photograph accurately portrayed the scratch marks on his face. (*Id.*). Nelson testified that Cynthia B. eventually asked him to get her cell phone, which he did, and shortly after she left the apartment. (R. 56:96-97). He stated he never pushed Cynthia B. down and he never punched her. (R. 56:97).

Jury Deliberations & Verdict

After an hour of deliberating, the jury submitted questions to the parties, asking for the statement Cynthia B. made to the deputy at the hospital and for any of Cynthia B.'s available medical records. (R. 56:151). The court instructed the jurors that they had to decide on the evidence admitted for trial; the documents they were asking for had not been admitted. (R. 56:152-53). After another hour of deliberations, the jury returned with a verdict, finding Nelson not guilty on both counts of battery, and guilty on disorderly conduct. (R. 56:153-54). The court proceeded directly to sentencing. (R. 56:156; App. 113).

Sentencing

The state asked the court to place Nelson on eighteen months probation with sixty days conditional jail time. (R. 56:158; App. 115). Nelson asked for probation with no conditional jail time. (R. 56:161; App. 118).

Restitution

The court asked the state about restitution, if the amounts requested on the victim restitution form previously filed with the court reflected the current amount requested. (R. 56:161-62; App. 118-19). The state conferred with

Cynthia B., then asked the court to accept the top two figures on the form: hospital expenses of $3,558.34 and a lost security deposit of $550.00.[5] (*Id.*). Nelson objected to the hospital expenses as being related to the battery offenses that he was acquitted of. (R. 56:162; App. 119)[6]. The state argued that Chapter 950 of the Wisconsin Statutes, governing rights of victims, was broad enough to encompass the damages. (R. 56:163; App. 120). The circuit court found that, "this was a domestic abuse the result of the victim going to the hospital and sustaining medical costs of $3,588.38." (R. 56:165; App. 122). The circuit court further stated that, "the jurors in this case did decide that Mr. Nelson was clearly the aggressor and . . . that abusive behavior resulted in the victim going to the hospital and incurring those medical bills." (R. 56:165-66; App. 122-23).

Sentence

The court followed the state's recommendation and ordered eighteen months probation, sixty days of conditional jail time, and restitution totaling $4,138.38. (R. 56:167; 34; App. 124, 130). Nelson filed a notice of intent to pursue postconviction relief. (R. 33).

Postconviction Proceedings.

Nelson filed a motion for postconviction relief, arguing he had improperly been held responsible for the submitted medical bills. (*See* R. 40; App. 131-138). The

[5] The other amounts on the restitution form Cynthia B. declined to ask for at sentencing after conferring with the state were: storage fees of $146.00 as a result of not having a permanent address after the incident, lost wages of $4,160.00 for 13 weeks of work Cynthia B. claimed she missed after resigning from her job because of her injuries, and $1,000.00 for half the value of a Lincoln Town Car in Nelson's name but used by Cynthia B. to drive to work and to run errands. (R. 12:1-2; App. 125-26).

[6] Nelson also objected to the $550.00 amount Cynthia B. asked for (half of the security deposit on the apartment he shared with Cynthia B.) at the sentencing hearing; however it is not being contested in this appeal.

circuit court held a hearing on the motion at which Nelson and the state made oral arguments. (*See* R. 57:1-7; App. 139-146).

Nelson argued that the facts and testimony provided in support of the battery charges were that Nelson punched Cynthia B., and that the hospital visit was because of the alleged punching. (R. 57:2; App. 140). Nelson stated that if he was acquitted of the battery, then he should not be held responsible for anything that was done at the hospital. (*Id.*). Nelson further argued that the two bills submitted did not specifically support the battery allegations because one was for the emergency room visit and one was for the CAT scan done. (R. 57:2-3; App. 140-41). Nelson stated that CAT scans are ordered as almost a routine matter these days; if anyone goes into an emergency room complaining of an injury, there will subsequently be a bill for the visit and a CAT scan. (R. 57:3; App. 141). Nelson argued that not only was the testimony provided towards the battery not credible to the jury for their not guilty finding, but there was no further evidence in the hospital bills, for example an x-ray or a follow-up with a specialist, to suggest the initial visit was necessary. (*Id.*). Lastly Nelson argued to the court there was no way to go from committing a disorderly conduct action leading to hospital bills, without also being found guilty of an unwanted and intentional touching causing bodily harm: a battery. (*Id.*).

The state responded that just because Nelson was not convicted of the battery he should not be held responsible for the victim's injuries. (R. 57:4; App. 142). The state argued that Nelson was convicted of disorderly conduct, which includes abusive and violent conduct, and that it is considered to be violent and abusive behavior when someone physically attacks someone else. (*Id.*). The state said it was irrelevant that the jury found Nelson not guilty of the battery and that should not factor into the court's decision because, "[T]he [c]ourt knows juries often compromise their verdicts and they

split verdicts and find a person guilty of one crime and not the other." (*Id.*).

Nelson replied that disorderly conduct is defined as numerous potential behaviors which are offered in the disjunctive: "abusive, boisterous, incident, profane, loud, violent, or otherwise," and the parties could not assume the jury was picking out the violent behavior when looking at the statute and finding Nelson disorderly. (*Id.*). Nelson cited to Wis. Stat. § 973.20, stating that when a court imposes a sentence it can attribute restitution for a crime a defendant is convicted of or one that is considered; the battery should not be considered because it was not dismissed and read in, Nelson was acquitted of it. (R. 57:6; App. 144). Nelson concluded by stating it was improper to take the violent portion out of the disorderly conduct definition to find him responsible for the actions of a battery. (*Id.*).

The court denied the postconviction motion, stating that the restitution was attributable to the violent and abusive behavior of the disorderly conduct Nelson was convicted of. (R. 57:7-8; 43; App. 145-46, 147). Nelson appeals. (*See* R. 44).

Additional facts relevant to the argument will be presented below.

ARGUMENT

The circuit court erroneously exercised its discretion in requiring Nelson to pay for the emergency room bills because Nelson's criminal activity under his conviction was not a substantial factor in causing the injuries that were examined in the emergency room.

The circuit court did not logically interpret the facts and did not use the proper legal standard when ordering

restitution against Nelson. This Court should vacate the hospital bills from the judgment and order for restitution.

Wisconsin's statute on restitution provides that,

> When imposing sentence or ordering probation for any crime . . . for which the defendant was convicted, the court . . . shall order the defendant to make full or partial restitution . . . to any victim of a crime considered at sentencing. . . .

Wis. Stat. § 973.20(1r).

Appellate courts have held that the above statutory language should be interpreted broadly to allow victims to recover their losses. *State v. Johnson*, 2002 WI App 166, ¶16, 256 Wis. 2d 871, 649 N.W.2d 284 (citing *Canady*, 2000 WI App 87 at ¶¶ 7-8). However, there must be a showing that the defendant's criminal activity was a substantial factor in causing the claimed losses. *Id.* Therefore, before restitution can be ordered, a causal nexus must be established between the crime considered at sentencing and the amount requested. *State v. Madlock*, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999). The victim must show that the criminal activity was a "substantial factor" in causing damage in proving causation. *Id*. The defendant's actions must be the "precipitating cause of the injury" and the harm must have resulted from the natural consequences of the defendant's actions. *Id.*

But statutory interpretation always begins with the language of the statute, if the meaning of the statute is plain; the court ordinarily stops the inquiry. *State v. Lee*, 2008 WI App 185, ¶7, 314 Wis. 2d 764, 762 N.W.2d. The restitution statute specifically defines "crime considered at sentencing" as any crime for which a defendant was convicted and any read-in crime. Wis. Stat. § 973.20(1g)(a).

The jury found Richard Nelson guilty of one crime, Disorderly Conduct. No other crimes were read-in. A person is guilty of Disorderly Conduct when he, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud ***or*** otherwise disorderly conduct that either causes or provokes a disturbance. Wis. Stat. § 947.01(1) (emphasis added).

The instructions provided to the jury provided the definition above, then broke the crime down into the two elements that the state needed to prove beyond a reasonable doubt,

> 1. The defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct.
> 2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

(R. 27:6; App. 110).

Much of the debate in this case has been about what exactly the jury was considering when finding Nelson guilty of disorderly conduct. Although no one can conclude what they actually considered, it is helpful to review the evidence the jury was given, and the arguments they heard at trial.[7]

In the state's brief opening argument, it stated,

> Any very simply what the State's going to try to help prove and help illustrate to you today is that last December 28, 2012 . . . at some point out on the balcony, Mr. Nelson smashed Cynthia twice in the face

[7] All quotations provided from witness testimonies and opening/closing statements from the trial transcript are excerpts relevant to the argument at hand. The full transcript is provided in the record.

with his fist. She was taken - - she was forced to go to the hospital. Ladies and gentlemen, that's the case.

(R. 56:28).

When Cynthia B. testified about being woken by Nelson when she had fallen asleep on the couch, the state focused on the disorderly conduct charge, asking, "So, now when you say 'scream,' I think it's important because one of the charges deals with disorderly conduct – when you say 'scream,' respectfully, can you tell us the volume that he created at you." (R. 56:40).

When Cynthia B. testified about being punched and pushed by Nelson, the state focused on the "intent to cause bodily harm" element of a battery,

A.[8] And then he punched me in the face.
Q. Now, I've got to stop you there because I'm - - maybe it was a slap?
A. No. It was a punch. It was a closed-fisted punch.
. . .
Q. How do you know it wasn't accidental?
A. The force of it.
. . .
Q. Let's get you back inside from that balcony, okay.
A. Um-hum.
Q. Now, he pushes you down, you testified?
A. Um-hum.
Q. Maybe that was accidental?
A. No, it was not accidental.
Q. In all fairness, you had your back to him?
A. Right.
Q. So, maybe he slipped and he pushed you.
A. No.

[8] When testimony is quoted directly from the trial transcript; all witness statements are preceded by "A."; the questioning attorney's statements all preceded by "Q."

(R. 27:3; 56:42, 46; App. 108).

The state then walked Cynthia B. through the events after the punching and pushing. Cynthia B. testified how Nelson took her into the bedroom, left and came back with the knife and attempted to talk to her about their relationship. (R. 56:47-48). Cynthia B. testified how she asked Nelson if she could get up, how she went into the closet to change her clothes because she had wet herself when he had come into the room with the knife. (R. 56:48). She testified how Nelson apologized and hugged her after she came out of the closet; and after he let go, she had to run into the bathroom to throw up. (R. 56:48-49). The state inquired into why she would throw up,

> Q. Two final questions for you. You went into the bathroom and you threw up. Do you know why you threw up?
> A. I wasn't exactly told, but I'm assuming from the head injury.
> Q. What head injury?
> A. From the hospital report I was told that I have a concussion. I had a concussion.
> Q. Okay. My final question for you - - I 'm sorry. You had a concussion?
> A. (Nods head.)
> Q. Okay. What is that from?
> A. From being hit.

(R. 56:49).

On cross-examination, Nelson asked Cynthia B., "When you gave a statement to Deputy Snover, you didn't tell him about going and throwing up in the bathroom did you?" to which she answered, "I'm not sure." (R. 56:61). On re-direct examination, the state asked Cynthia B.,

> Q. When you were leaving the building, were you hurt?
> A. I was hurt.
> Q. What was wrong?
> A. I had pain in the side of my head and my face right here and in the back of my neck.
> Q. At no time did you give him permission to hit you; is that correct?
> A. Correct.

(R. 56:63).

The state's evidence of Cynthia B.'s injuries, her testimony about a head injury which likely caused a concussion, are provided in support of the battery charges, and also in support of why she went to the hospital.

During Cynthia B.'s daughter Victoria Morgan's testimony, the state elicited more testimony about the injuries, asking Morgan, "did [the hospital] tell you what was wrong with your mom?" to which she answered, "She had some displacement of her jaw, and then she had a CAT scan which I followed her to the CAT scan area, and then afterwards they had said that she had some cranial damage in the back here like whiplash." (R. 56:69) (alteration in original). The state did not ask any follow-up questions. (*Id.*).

Lastly, during Deputy Snover's testimony, the state obtained the last of the evidence in support of the injuries,

> Q. The first time you saw [Cynthia B.], what do you see?
> A. Cindy[9] was laying on the hospital bed. Her eyes were watery as if she was crying. I saw a little bit of dried blood at the right side of her mouth, and the left cheekbone area was red and appeared to be puffier, a little swelling.
> . . .

[9] Cynthia B. also goes by "Cindy."

Q. And armed with your experience as law enforcement officer for thirteen years, were her injuries consistent to what she told you?
A. They appeared to me to be consistent with someone getting hit in the face.
Q. Can you describe her demeanor that evening.
. . .
A. She wasn't overly excited, but she was upset about it. She seemed a little emotional about the incident.

(R. 56:74,76) (alteration in original).

On cross-examination, Nelson asked Deputy Snover,

Q. And you didn't take any pictures of any injuries?
A. No.
Q. You have access to cameras?
A. Yes.
Q. [Cindy B.] told you that Mr. Nelson punched her in the face with a closed fist two times?
A. Yes, that's what she told me.
Q. She didn't have a bloody nose?
A. No.
Q. She didn't have a broken nose?
A. I don't know if she did or not. I'm not a doctor.
Q. You're not a doctor so you don't know what injury she had other than inflammation that she told you; is that correct?
A. Well, she had the injuries that I saw, you know, the blood and the little bit of swelling. But, as far as the extent of injuries, no, I don't know that.
. . .
Q. She didn't tell you that earlier that night she was in the bathroom throwing up, did she?
A. No.

(R. 56:78-79, 80) (alteration in original).

During the state's closing argument, it placed the elements of battery and disorderly conduct up before the jury. (R. 56:127). The state first went over the testimony of its witnesses,

> Now, he punches on the balcony, he punches her again, and then they go inside. Now was she pushed down, what once, twice? Whatever. But the point here, the State's case is he hit her in the face twice on the balcony. I suspect he was very angry. But, ladies and gentlemen, that's what Cindy testified, but look who else testified.
> The daughter testifies and says she's walking to the car hunched over. She's got dried blood and she's got swelling.
> And then we have a policeman at the hospital that she's she is upset. He testified, you know – counsel said, well, how upset was it? Not upset as some of the victims that we had but she's kind of upset. Was she crying? Yes. Do you see the swelling? Yes. Is this consistent with what she told you? Yes. That's what happened.
> This is not some cable crime show where we have deep conspiracies and - - what happened was a man hit a woman in the face twice.

(R. 56:130).

Next the state went over the elements of the crimes charged,

> [L]et's go over and see what the State has to prove, each element beyond a reasonable doubt, these are the essential elements that His Honor read to you. And we have found over the years it's probably better if you can see it than to hear it, okay.
> The first is the defendant caused bodily harm to Cindy. Now, cause means the defendant's act [sic] was a substantial factor. In other words, the fact that Cindy's testimony was he made a fist and hit me in the face,

okay. And the bodily harm means physical pain or injury. You heard the testimony. So, for the first element of battery, if you believe Cynthia, and if you believe - - and you believe the officer, if you believe after you have analyzed each witness that the defendant caused bodily harm to Cindy.

Number two, the defendant intended to cause the bodily harm to Cindy. Now, you can use your common judgment, your common sense. Those jury instructions that say you don't have to leave your common sense at the jury door. When someone makes a fist consistent with Cindy's testimony and rears back and throws it, is that intentional? . . . If you believe that making that fist is intentional, and if you believe Cynthia, then the State has fulfilled its criteria beyond a reasonable doubt.

There is a third and fourth factor that aren't here, and it deals with intent. The fact is the defendant has to intend to strike Cindy, that he did not get consent from Cindy, and he knew he didn't have consent. That's why I asked Cindy those questions. Maybe he misunderstood you. Maybe you wanted him to hit you. You heard her reaction. No.

. . .

[T]he State maintains today that the evidence has proven that Mr. Nelson struck Cindy twice. That's why we have two counts of battery.

The other aspect is disorderly conduct. And disorderly conduct is the defendant engaged in violent, abusive, indecent, profane, and the conduct under the circumstances tended to cause a disturbance.

For an example - - people will ask me about this - - we're at a football game at Lambeau, and I have a thing about a certain wide receiver from the Minnesota Vikings. I think he's a traitor, and we wears number 15. So, when I'm on the football field and I see Greg out there, Mr. Jennings, I may make a comment about his wife or his daughter, something ugly and terrible or about how fat his head is to fit in his helmet, whatever

> I'd say. That's not disorderly conduct because we're all at a football game, and our comments at a football game don't tend to create a disturbance.
>
> The same thing can be said at a prison or some of these middle school cafeterias I walk through. They are very noisy and there is nothing that goes on in there that would cause a disturbance.
>
> But in a balcony of an apartment, or, ladies and gentlemen of the jury, perhaps if you find the disorderly conduct can be the abusive behavior with the punch and perhaps when they go inside and he pushes her down two times, those are all examples of disorderly conduct. And you may take a choice. I would think it would be something that happened out on the balcony.

(R. 56:131-34) (alteration in original).

In his closing statement, Nelson highlighted the following,

> [Cynthia B.] really didn't have an explanation for how she could have been leaning over the balcony, hand on the railing, and then be struck a second time with a closed fist in the face. She didn't explain that.
>
> . . .
>
> And [the state] agrees that Mr. Nelson is a big guy. [Cynthia B.] agrees, oh, yeah, he's strong. So, she's saying she got punched in the face twice, and the only evidence that's been presented, the only testimony that's been presented is a couple drops of blood, excuse me, on the right side of her face by her mouth. And I believe Deputy Snover testified that her left cheek was a little puffier.
>
> There is no black eyes, there is no bloody nose, there is no bruises, frankly, not even enough to apparently compel Deputy Snover to take photos. . . . There is no documentation. . . . We don't have medical records.

> We do have a photo of the injuries that [Nelson] received . . . once you review all the testimony, you look at all the evidence, you can agree that Mr. Nelson's version of what happened on the balcony is the accurate description.
>
> . . .
>
> I talked a little bit about Deputy Snover. He, as [the state] pointed out, indicated that he believed the injuries that [Cynthia B.] described to him in his experience were consistent. Of course when I asked him questions, he's like "Oh, I'm not a doctor, I don't know." Well, you can't have it both ways.

(R. 56:139-142) (alterations in original).

The state spoke last to the jury, responding to Nelson, "I maintain the truth is this couple had a fight, Mr. Nelson got angry, slugged his ex-girlfriend twice. And because of those two batteries out on the balcony that's why she was taken by her daughter to the hospital."

Although the state and the circuit state the restitution is due to Nelson's disorderly conduct, record shows the crimes considered for restitution by the state and the circuit court were the two battery charges Nelson was acquitted of. If the jury relied on Nelson's testimony over Cynthia B.'s about what transpired on the balcony, that she slipped and fell while lunging towards him, this is an independent act not of Nelson's doing and he should not have to pay for it. If the jury believed Nelson did cause Cynthia B.'s injuries by striking her, the only possible reason it found Nelson not guilty is if it believed he punched her in the face two times but did not intend to harm her. This interpretation of the facts is illogical because there is no testimony or evidence to support a finding that if he did punch her in the face two times, he did not intend to harm her. The only logical interpretation of the jury's verdict is that the jury finding

Nelson was guilty of a crime but that crime was not punching Cynthia B.

Regardless, the jury found Nelson not guilty of the battery charges, ordering him to pay restitution for Cynthia B.'s hospital bills required her showing his criminal disorderly actions were a substantial factor in causing her to incur the hospital expenses. Such a showing was not made in this case. The only crime considered at sentencing was disorderly conduct. Although punching Cynthia B. in the face certainly would be disorderly conduct, punching her in the face was the crime Nelson was acquitted of. Proper interpretation of the facts leading to ordering payment for the hospital visit requires a finding Nelson caused injuries by committing an act other than punching her. Yet there was no testimony or other evidence that indicated even slightly that the alleged injuries and ensuing hospital visit were caused by something other than the alleged punches.

Additionally, the record does not reflect that the circuit court's statements at sentencing and at the postconviction motion hearing do not reflect an application of the applied the correct legal standard. The circuit court's finding that it could not entirely rule out the possibility that the jury believed Nelson punched and injured Bourassa, but found him not guilty of battery because Nelson did not *intend* the punches to harm her, is different than finding by the preponderance of the evidence that Nelson did cause Bourassa's injuries by punching her. (R. 56:162-63; App. 119-120). Essentially the circuit court said that because there was a crime, and because there were medical expenses, the crime caused the medical expenses. Such a statement does not address the "substantial factor" link.

Even assuming Nelson caused the injuries, the victim did not show by a preponderance of the evidence that the reason Bourassa underwent a CAT scan was because of the injuries to her face. See Wis. Stat. § 973.20(14)(a). The

extent of the state's argument at sentencing regarding restitution for Bourassa's medical expenses was simply stating that she was seeking the entire amount listed on her hospital bills. R. 56:162; App. 119). The two medical bills the State submitted to the Court state that Bourassa was charged $1,061.00 for Cat Scans and $2,527.00 for the emergency room visit, without any further detail or explanation. (*See* R. 12; App. 125-29).

What in essence happened is the circuit court ordered a judgment notwithstanding the verdict through the sentencing hearing. All statements made by the court indicted the court believed Nelson committed the battery, and he was admonished and sentenced accordingly. The state also referenced this belief at the postconviction motion hearing when stating that the court knows the juries often compromise their verdicts. (R. 57:5; App. 143). The state failed to meet its burden on the battery charge at trial, yet now Nelson has to be held responsible for hospital bills that do not clearly show they treated the egregious battery he was accused of, and are even more further removed from the disorderly conduct conviction. The primary purpose of restitution is not to punish the defendant, but to compensate the victim. *Madlock*, 230 Wis. 2d 324 at 332.

CONCLUSION

For the reasons provided here, Richard Nelson respectfully requests this court vacate the part of the appealed judgment and order requiring Nelson to pay $3,588.38 for the hospital bills.

Dated this 20th day of November, 2014.

Respectfully submitted,

Richard Nelson, Defendant-Appellant

_____

FARHEEN ANSARI
Wisconsin Bar No. 1063641
AF Law
Post Office Box 8822
Madison, WI 53708
(608) 205-8016

AF@AFLawyer.com

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,802 words.

Dated this 20th day of November, 2014.

Signed:

_____

FARHEEN ANSARI
Wisconsin Bar No. 1063641
AF Law
Post Office Box 8822
Madison, WI 53708
(608) 205-8016
AF@AFLawyer.com

Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of November, 2014.

Signed:

_____

FARHEEN ANSARI
Wisconsin Bar No. 1063641
AF Law
Post Office Box 8822
Madison, WI 53708
(608) 205-8016
AF@AFLawyer.com

Attorney for Defendant-Appellant