

RECEIVED

12-17-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT III

Case No. 2014AP1794-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD J. NELSON

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT FOR BROWN COUNTY,
WILLIAM M. ATKINSON, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

DAVID LASEE
District Attorney

KARYN E. BEHLING
Assistant District Attorney
State Bar #1064871

Attorneys for Plaintiff-Respondent

Brown County District Attorney's Office
300 East Walnut Street
Green Bay, Wisconsin 54301
(920) 448-4190 (Phone)
(920) 448-6382 (Fax)
Karyn.behling@da.wi.gov

TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUE.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	2
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	3
ARGUMENT	3
THE CIRCUIT COURT PROPERLY ORDERED MR. NELSON TO PAY RESTITUTION TO THE VICTIM FOR HER MEDICAL BILLS.....	3
CONCLUSION.....	7
CERTIFICATION	8

Cases

State v. Canady, 2000 WI App 87, 234 Wis. 2d 261, 610 N.W.2d 147.....	5
State v. Frey, 2012 WI 99, 343 W2d 358	6
State v. Hoseman, 2011 WI App 88, 334 Wis. 2d 415, 799 N.W.2d 479.....	3, 4, 5
State v. Kayon, 2002 WI App 178, 256 Wis. 2d 577, 649 N.W.2d 334.....	3
State v. Longmire, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534.....	3, 4, 5

State v. Madlock,
230 Wis. 2d 324,
602 N.W.2d 104 (Ct. App. 1999)4,5,6

State v. Rash,
2003 WI App 32, 260 Wis. 2d 369,
659 N.W.2d 1894, 5, 6

State v. Von Loh,
157 W2d 91 (CA 1990)6

Statutes

Wis. Stat. § 973.20 (1g)3

Wis. Stat. § 973.20 (1r).....3

Wis. Stat. § 950.02(4)(a)(1)4

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2014AP1794-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD J. NELSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT FOR BROWN COUNTY,
WILLIAM M. ATKINSON, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

STATEMENT OF THE ISSUES

Did the trial court have the authority to order Mr. Nelson to pay \$3,588.38 in restitution for the victim's medical bills, after being convicted of Disorderly Conduct and acquitted of Battery?

Trial Court Answered: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this case involves only the application of settled law to the facts of this case.

STATEMENT OF THE CASE

On January 2, 2013, Mr. Nelson was charged with two counts of battery, domestic abuse, and one count of disorderly conduct, domestic abuse. On October 30, 2013, there was a jury trial and Mr. Nelson was found not guilty on two counts of battery and guilty on one count of disorderly conduct. (R156). Nelson testified at the jury trial that he had been drinking (R88:2) and had woken up Cynthia B. (R89:15-16) and that she was aggravated (R90:6). Cynthia B. testified that Nelson woke her up by screaming her name (R39:19) and that she went outside on the balcony to smoke a cigarette (R41:13-14). When she was out on the balcony, Nelson came out there too and grabbed her by the jacket and turned her around and then he punched her in the face. (R41:19-25).

She further testified that Nelson held onto her jacket and pushed her over the balcony. (R42:20-21). Cynthia B. testified that her belly was against the balcony and her hands were on the railing and she could look down and see the ground. (R44:13-15). She then remembers being in the living room and being pushed down from behind, she stands up and he pushed her down again. (R45:16-20). She testified she had a concussion from being hit. (R49:18-25). And she sought medical treatment at a hospital. The court sentenced Nelson on October 30, 2013, to 18 months of probation with conditions to include: 60 days in jail, a COMPAS evaluation and follow thru with any treatment, restitution in the amount of \$3,588.38 for medical bills, and court costs.

Mr. Nelson filed a motion for post-conviction relief on June 9, 2014, asking the trial court to vacate the restitution order for the medical bills. On July 8, 2014,

the motion was heard before the trial court. The trial court denied Mr. Nelson's motion, but no written decision was issued. The State respectfully asks this Court to deny the appeal.

STANDARD OF REVIEW

Whether the trial court had the authority to order restitution given the facts before it is a question of law that this Court reviews *de novo*. *State v. Kayon*, 2002 WI App 178, ¶5, 256 Wis. 2d 577, 649 N.W.2d 334. Alternatively, “[w]hen there is no dispute whether the sentencing court had authority to order restitution in the first instance, this Court reviews the restitution order’s terms for an erroneous exercise of discretion.” *Id.* Because Mr. Nelson does not challenge the terms of the restitution order, but instead challenges whether the trial court had the authority to order restitution to the victim for her medical bills, this Court should review its decision *de novo*. *See id.*

ARGUMENT

THE CIRCUIT COURT PROPERLY ORDERED MR. NELSON TO PAY RESTITUTION TO THE VICTIM FOR HER MEDICAL BILLS.

A court must ordinarily order restitution for any crime considered at sentencing, including the crime for which the defendant was convicted and any read in offense. *State v. Longmire*, 2004 WI App 90, ¶ 11, 272 Wis. 2d 759, 681 N.W.2d 534; Wis. Stat. § 973.20(1g), (1r) (2009-10).

“Restitution is governed by WIS. STAT. § 973.20.” *State v. Hoseman*, 2011 WI App 88, ¶14, 334 Wis. 2d 415, 799 N.W.2d 479. Section 973.20(1r) provides that the trial court “shall order the defendant to make full or partial restitution ... to any victim of a crime considered at sentencing.” The phrase “a crime considered at sentencing” is defined as “any crime for which the defendant was convicted and any read-in crime.” Section

973.20(1g)(a). “[T]he restitution statute does not define the term ‘victim,’” *see Hoseman*, 334 Wis. 2d 415, ¶15; however, WIS. STAT. § 950.02(4)(a)1., a related statute, provides that “victim” means “[a] person against whom a crime has been committed,” *see also Hoseman*, 334 Wis. 2d 415, ¶15.

The court is not limited to ordering restitution on the basis of just those facts that support the elements of the specific charge, but may consider all facts and reasonable inferences concerning the defendant’s activity relating to the crimes considered. *Longmire*, 272 Wis. 2d 759, ¶ 13; *State v. Rash*, 2003 WI App 32, ¶ 8, 260 Wis. 2d 369, 659 N.W.2d 189.

In determining whether the trial court had the authority to order restitution given the facts before it, this Court should apply a two-part test. *See Hoseman*, 334 Wis. 2d 415, ¶16. Under the first part of the test, the restitution claimant must be a “direct victim” of the crime. *Id.* Under the second part, there must be a causal connection or nexus between the defendant’s conduct and the harm suffered by the victim. *See id.* In proving causation, 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. *State v. Madlock*, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999) (citation omitted).

The restitution statute is victim oriented. This Court is to construe the restitution statute “broadly and liberally in order to allow victims to recover their losses as a result of a defendant’s criminal conduct.” *See id.* at 332 (citation omitted).

Mr. Nelson does not dispute that Cynthia B. was a direct victim, Mr. Nelson instead argues that there is not a causal connection between the crime for which he was convicted and the restitution that was ordered. The State disagrees.

There absolutely was a connection between the medical expenses ordered as restitution and the crime committed. While Mr. Nelson contends that there is no direct evidence linking him to the injuries sustained because he was acquitted of the battery counts, that is not

the basis of this Court's inquiry. Rather, this Court looks at whether the defendant's actions were the "precipitating cause of the injury," and whether the harm resulted from the "natural consequences: of the defendant's actions. See *Madlock*, 230 Wis. 2d at 333 (citation omitted).

Before restitution can be ordered there must be a causal nexus between the crime considered at sentencing and the damage done to the victim. *Rash*, 260 Wis. 2d 369, ¶ 6; *State v. Canady*, 2000 WI App 87, ¶ 9, 234 Wis. 2d 261, 610 N.W.2d 147. The defendant's actions must be the precipitating cause of the injury, and the harm must have resulted as a natural consequence of those actions. *Rash*, 260 Wis. 2d 369, ¶ 6; *Canady*, 234 Wis. 2d 261, ¶ 9.

But the defendant need not have directly caused the damage, or have intended or expected to cause the damage, or even have been aware of the damage, as long as his actions were a substantial factor in causing it. *Longmire*, 272 Wis. 2d 759, ¶ 13; *Rash*, 260 Wis. 2d 369, ¶¶ 7, 8; *Canady*, 234 Wis. 2d 261, ¶¶ 9, 12. It is enough if the defendant's criminal acts set into motion events that resulted in the damage or injury. *Hoseman*, 334 Wis. 2d 415, ¶ 26; *Longmire*, 272 Wis. 2d 759, ¶ 13; *Rash*, 260 Wis. 2d 369, ¶ 7.

In this case, Mr. Nelson's actions were a precipitating cause of the medical bills; had the defendant not committed a disorderly conduct then there would have been no injuries and the victim would not have had to go to the hospital.

Restitution was properly ordered for the medical bills associated with the disorderly conduct for which the defendant, Mr. Nelson, was convicted. This Court cannot distinguish which facts the jury applied to the Disorderly Conduct conviction. The trial court appropriately considered all facts that were solicited at the jury trial in determining restitution in this matter. Judge Atkinson stated that Mr. Nelson was convicted of a crime and as a result the victim incurred hospital expenses. (R163:5-7). Judge Atkinson made a finding regarding restitution stating that this case was a domestic abuse and the result was the victim going to the hospital and sustaining medical costs of \$3,588.38. The testimony was that there

was abusive behavior towards the victim, and that the jurors in the case decided that Mr. Nelson was clearly the aggressor and that he met the elements of disorderly conduct which include abusive behavior and that abusive behavior resulted in the victim going to the hospital and incurring those medical bills. (R165-166:5-25,1).

There is no evidence that the injuries were caused at some other time, or that the injuries were caused by some other person. Instead, the evidence showed that the injuries were caused due to the disorderly conduct that the defendant was convicted of committing. It was the disorderly conduct that set into motion the events that resulted in the injury to Cynthia B. and subsequent hospital visit.

We cannot guess what facts the jury used to determine the guilt as to the Disorderly Conduct. Disorderly Conduct encompasses all types of behavior as the standard WI-JI 1900 states: the conduct can be violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly. Just because Mr. Nelson was acquitted of battery does not mean that certain facts solicited at trial should be excluded at sentencing.

At sentencing it is the court's responsibility to consider all relevant sentencing factors including dismissed, uncharged, or unproven offenses or facts underlying expunged offenses, and including conduct for which the Defendant was acquitted, if relevant. *State v. Frey*, 2012 WI 99, 343 W2d 358; *State v. Von Loh*, 157 W2d 91 (CA 1990). In this case the conduct for which Nelson was acquitted was most certainly relevant for the Judge to consider at sentencing. The facts of the acquitted and convicted offenses are so interwoven that they cannot possibly be separated. It can reasonably be inferred that Mr. Nelson's crime was a substantial factor in the injuries suffered by Cynthia B. which resulted in her medical bills.

The trial court properly exercised its discretion when ordering the restitution because a causal link was established when the defendant's criminal act set into motion the events that led to the victim going to the hospital. *See Rash*, 260 Wis. 2d 369, ¶ 5. This Court

should uphold the trial court's authority to order restitution in this case for the victim's medical bills.

CONCLUSION

It is therefore respectfully submitted that the judgment convicting Mr. Nelson of disorderly conduct, and the included order requiring him to pay restitution to the victim for her medical bills, should be affirmed.

Dated this 15th day of December, 2014.

David Lasee
District Attorney

/s/Karyn E. Behling

KARYN E. BEHLING
Assistant District Attorney
State Bar #1064871

Attorneys for Plaintiff-Respondent

Brown County District Attorney's Office
300 East Walnut Street
Green Bay, Wisconsin 54301
(920) 448-4190 (Phone)
(920) 448-6382 (Fax)
Karyn.behling@da.wi.gov

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,806 words.

Dated this 15th day of December, 2014.

/s/Karyn E. Behling

Karyn E. Behling
Assistant District Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 15th day of December, 2014.

/s/Karyn E. Behling

Karyn E. Behling
Assistant District Attorney