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

REPLY BRIEF
OF DEFENDANT-APPELLANT

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ARGUMENT

The circuit court was not authorized to order restitution for medical expenses on Nelson's conviction of disorderly conduct. Alternatively, the circuit court erroneously exercised its discretion in requiring Nelson to pay for medical expenses because the state failed to prove that Nelson's disorderly conduct caused the visit to the emergency room.

Failure of Proof

The State incorrectly states Nelson's position on restitution. Nelson is not exclusively challenging the court's authority to order restitution; he is also challenging the terms of the restitution order. A circuit court's 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. However, this Court reviews the terms of the restitution order for an erroneous exercise of discretion. *Id.* It is an abuse of discretion for the trial court to rely upon irrelevant or immaterial factors at sentencing. *Elias v. State*, 93 Wis. 2d 278, 282, 286 N.W.2d 559, 561 (1980). There was an abuse of discretion at Nelson's sentencing hearing when the court made findings of fact contrary to the jury's verdict and ordered restitution for Cynthia B's emergency room visit. The state failed to prove that those expenses were necessary, and the state failed to prove that Nelson's disorderly conduct caused the medical expenses.

If the crime considered at sentencing caused bodily harm, the court may order the defendant to pay restitution that

covers *necessary* medical expenses. Wis. Stat. § 973.20(3)(a) (2011-2012) (emphasis added). The only evidence in the record purporting to show harm requiring restitution is a bill from an emergency room visit and a bill for a CAT scan. (R. 57:2-3). Even utilizing the low standard of preponderance of the evidence, absent additional medical testimony, a bill is not enough to demonstrate the necessity of medical expenses. *Smee v. Checker Cab Co.*, 1 Wis. 2d 202, 206, 83 N.W.2d 492, 495 (1957) (holding that a bill was not enough to prove causation when no evidence was presented to show what the treatment was for or that treatment was even needed).

Lay testimony is insufficient to show causation for medical expenses; medical corroboration is necessary. *Pucci v. Rausch*, 51 Wis. 2d 513, 517, 187 N.W.2d 138, 141 (1971). The state failed to introduce at trial any medical records to demonstrate what treatment or care was given to Cynthia B., why the care was necessary, or even that the care was necessary. No doctors testified that her purported injuries required medical care. No results from the CAT scan were introduced into the record to show that such a test was necessary. No evidence was produced to show follow-up care or treatment to demonstrate that the initial visit was even warranted, let alone necessary. (R. 56:152). In fact, Cynthia B.'s purported injuries were so minor and disappeared so quickly that the responding officer decided not to take pictures. (R. 56: 78).

Accordingly, the jury acquitted Nelson of battery. In this case and with the evidence presented by the state, it is impossible to go from disorderly conduct to necessary medical care without a battery. By simply showing a hospital bill, the state ignores the need to establish a causal connection and repeatedly fails to articulate the criminal act that caused the injury that necessitated a hospital visit.

Anyone can walk into an emergency room and claim to have been battered. Regardless of whether the statement is

true or not, physicians will order tests and bill the person not only for the tests, but for simply visiting the emergency room. The only thing the evidence proves is that Cynthia B. went to the emergency room. It does not prove that she sustained injuries, that she received treatment, or even that she required treatment. Nelson cannot be ordered to pay necessary medical expenses when the state offered no evidence or medical corroboration to show that the expenses were necessary.

The victim bears the burden of showing by a preponderance of the evidence both the amount of loss sustained and that the loss was sustained as a result of the crime considered at the defendant's sentencing. Wis. Stat. § 973.20(14)(a). The victim must prove a causal nexus between the defendant's conduct and the harm requiring restitution. *State v. Hoseman*, 2011 WI App 88 ¶ 16, 334 Wis. 2d 415, 799 N.W.2d 479. In this case, the only crime considered at sentencing was disorderly conduct.

The Jury as Fact Finder

The jury acts as the finder of fact, chooses among conflicting inferences, and may reject inferences as they see fit, within the bounds of reason. *State v. Poellinger*, 153 Wis. 2d 493, 503, 451 N.W.2d 752, 756 (1990). It is the jury's role and responsibility to determine credibility, not the court's. *Id.* At both the sentencing hearing and postconviction motion hearing, the state and court contended that the violent and abusive descriptions encompassed in the definition of disorderly conduct proved the jury believed Nelson to be responsible for this apparently necessary hospital trip. (R. 165-166:5-25, 1). The court considered all the testimony provided in support of the battery charge, stated that juries have a difficult time making decisions, and sentenced Nelson harshly by utilizing the maximum probation period allowed and ordering 60 days of conditional jail time. The court admonished Nelson as though he had battered Cynthia B., mentioning Nelson's prior conviction for battery as a

comparison. (R. 56:165-167). The court improperly imputed its theory of what happened onto the jury's findings of fact.

A conviction for disorderly conduct stems from "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." Wis. Stat. § 947.01(1) (2011-2012). Despite the broad nature of the charge and countless ways one might violate the statute, the court assumed the jury only considered two of the seven disjunctive adjectives, 'violent' and 'abusive.' The court further stated that the conviction of disorderly conduct proved "the jurors in this case did decide that Nelson was clearly the aggressor…." (R. 56:165).

One undisputed fact in this case is that Nelson and Cynthia B. engaged in a loud argument in their apartment. This fact justifies a charging, and subsequent conviction, of disorderly conduct against both Nelson and Cynthia B. Just because the jury was not presented with the question of whether Cynthia B. was disorderly that night does not mean they concluded that she was not. It is entirely improper for the state and the circuit court to claim that the jury found Nelson to be the aggressor whose actions started a chain of events which led to Cynthia B. going to the hospital. The only thing the jury determined was that Nelson was guilty of disorderly conduct. (R. 56:154). To be found disorderly is not to be found the aggressor; it is not a finding of instigation; it is not a finding of violence. The jury presents a verdict of either guilty or not guilty; it does not submit a written summary of what the members think happened.

After the jury found that an unwanted touching resulting in harm did not occur, the court and state basically used a side road arriving to the guilt of battery by cherry-picking elements of disorderly conduct that fit into the battery definition. The state had the opportunity at trial to provide stronger testimony, medical reports, photographs, or anything

else that would have proven an unwanted touching leading to necessary medical care, but they failed to do so.

As stated above, is equally plausible that a jury in a trial with Cynthia B. as the defendant would find her guilty of disorderly conduct based on her and Nelson's testimony on the argument that took place on December 28, 2012. It would be absurd to argue that such a hypothetical finding would necessitate a further inference that the jury believed Cynthia B. to be the aggressor. Such an inference goes above and beyond the jury's verdict.

The State concedes they cannot even "guess what facts the jury used to determine the guilt as to the disorderly conduct." (State's Brief at 6). The State argues that such uncertainty demonstrates that "the acquitted and convicted offenses are so interwoven that they cannot possibly be separated." *Id.* That is inconsistent with the jury's verdict. We may not know which facts the jury considered in finding Nelson guilty of disorderly conduct, but we do know which facts they rejected. They rejected the theory that Nelson intentionally punched Cynthia B. in the face and intentionally pushed her down; yet that very theory is the only assertion made by the state to support causation. (R. 56:144).

In the hearing for postconviction relief on this issue, the state argued causation by saying, "[A]s for the victim going to the hospital, really but for this incident, I see no reason why she would have gone to the hospital and incurred these expenses." (R. 57:5). Inserting "but for" into a conclusory statement does not demonstrate a causal chain. The statements by the court and the state in trying to show a causal nexus between disorderly conduct and a hospital visit was not based on the evidence and facts found by the jury to be true.

In the absence of evidence, the state argued that the findings of the jury were irrelevant, contending that

consideration of the battery charges of which Nelson was acquitted was appropriate because "the Court knows juries often compromise their verdicts…." *Id*. This argument undermines the entire criminal justice system in which the state bears the burden of proving the charges they bring and juries act as the finders of fact. Just because the state and the court are not pleased with the decision of the jury does not mean they can regard the jury's findings of fact as irrelevant and substitute their interpretation of the case.

The State argues, "There is no evidence that the injuries were caused at some other time, or that the injuries were caused by some other person." (State's Brief at 6). Assuming arguendo that injuries even existed, the *onus probandi* remains on the State. Their argument improperly shifts the burdens of production and persuasion to Nelson. In criminal proceedings, the absence of evidence works to the detriment of the state; the defendant does not and should not carry the weight of the state's deficiencies.

Nevertheless, the State's theory causes it to ignore crucial evidence that rebuts the theory that the appellant's disorderly conduct was the only possible cause of harm. The appellant credibly testified that Cynthia B. aggressively reached out to grab him while on an icy balcony, falling down in the process (R. 56:93-94). Because there are only two competing theories of harm to Cynthia B. (that she was intentionally punched in the face, constituting a battery, and that she slipped on the ice while lunging for the defendant) there is only one logical conclusion when the jury has properly acted as fact finder and rejected the first theory out of hand; i.e., if Cynthia B. did actually sustain any injuries, they were the result of her own actions.

As the State points out, the court may consider all facts and reasonable inferences concerning Nelson's behavior relating to the crimes considered. When the only crime considered, however, is disorderly conduct, and the state's

only theory of harm at trial was an unwanted intentional touching that caused harm, all reasonable inferences from disorderly conduct must go through the charge of battery to make claims for restitution plausible. The jury found the defendant not guilty of battery. In the absence of battery, there are no reasonable inferences that allow the court to jump from disorderly conduct to necessary medical care.

The State's Inapposite Case Law

The State points out that dismissed and unproven charges may be considered at sentencing. *State v. Frey*, 2012 WI 99, ¶ 47, 343 Wis. 2d 358, 817 N.W.2d 436. Their argument, however, neglects important caveats. Although dismissed charges may be considered at sentencing, dismissed charges that are not read-in are *not* to subject to restitution. *Id* at ¶ 43. If unread-in dismissed charges are not subject to restitution, charges for which the jury has returned verdicts of not guilty should certainly not be subject to restitution.

The State is correct in arguing that the court may consider dismissals, unproven charges, and even conduct underlying acquittals, if relevant, for sentencing purposes, *Id.* at ¶ 47, however those charges must be substantiated by the evidence. Each of the cases cited by the State in their claim that it was proper for the judge to consider the charges of which Nelson was acquitted are distinguished by the present case in that the underlying conduct considered by the trial court in those cases was substantiated by the evidentiary record. *Id.* at ¶ 54 (substantiating the underlying conduct through a providential plea and hearing at sentencing); *State v. Von Loh*, 157 Wis. 2d 91, 97, 458 N.W.2d 556, 558 (Ct. App. 1990) (finding it acceptable to consider pending charges when the court made it clear that it would not consider the unproven allegations to enhance defendant's sentence); *State v. Hoseman*, 2011 WI App 88, ¶28, 334 Wis. 2d 415, 799 N.W.2d 479 (finding clear causal connection between

conduct and harm when conduct was substantiated by convictions and was not predicated on acquitted behavior).

Nelson's claim is more clear-cut than the claims in the cases cited by the State. Battery is a clearly defined crime with a clearly defined result. Either Nelson punched Cynthia B. in the face with a closed fist and pushed her to the ground, thereby causing bodily harm, or he did not. The jury, after hearing all the evidence and weighing credibility, determined that the appellant did not punch Cynthia B. in the face with a closed fist or push her to the ground to cause bodily harm. In the absence of battery, none of the alternative criminal acts constituting disorderly conduct could reasonably lead to a necessary hospital visit; therefore the State persists in neglecting to articulate the specific conduct that was disorderly. It may have been the yelling, it may have been holding a knife in the bedroom, or it could have been waking her up and engaging in an argument. It could not have been battery.

Unlike in the cited cases, the State has no convictions of lesser-included offenses resulting in acquittal of higher charges on which to rely. There are no dismissed charges that were read in as part of a plea deal. There was no guilty plea and inquiry on which to rely in establishing underlying conduct. Apart from her own testimony, there was absolutely no evidence that Nelson caused Cynthia B.'s purported injuries that resulted in her seeking medical treatment, the need for which remains unsubstantiated by the evidence and by the findings of the jury. The complete absence of evidentiary support in this case stands in stark contrast to the cases that support consideration of unproven charges, all of which still require evidentiary substantiation in the record.

Abuse of Discretion

A finding that the sentencing court did not abuse its discretion requires that the court "logically interpreted the

facts, applied the proper legal standard and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach." (*State v. Johnson*, 2002 WI App 166 ¶ 7, 256 Wis. 2d 871, 649 N.W.2d 284). The court proposes a propositional fallacy in that all of the disjunctively listed behavior in § 947.01(1) ("violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct") could result in a conviction for disorderly conduct, and the jury could have thought that some of those disjunctively listed behaviors (violent and abusive) could have caused injuries that required medical care; therefore, the disorderly conduct must have caused injuries that required medical care. The state relies on an indicative conditional in which the antecedent is argued as true simply because the consequent is true.

This Court has already explicitly rejected such "ipso facto" logical fallacies. *State v. Madlock*, 230 Wis. 2d 324, 334, 602 N.W.2d 104, 109 (Ct. App. 1999) (rejecting the argument that a cause was established for restitution just because defendant was convicted of a crime related to a car and the car was returned with damage). The court's logical interpretation of the facts and demonstrated, rational process required by *Johnson* is absent in this case. 2002 WI App 166 ¶ 16. Accordingly, the court abused its discretion in ordering Nelson to pay for medical expenses.

The court may not sentence in a manner that replaces the jury's judgment with their own. *State v. Bobbitt*, 178 Wis. 2d 11, 18, 503 N.W.2d 11, 15 (Ct. App. 1993). That the State requests the Court find causation due to a lack of evidence and that the State now contends the jury findings should be ignored because "the Court knows juries often compromise their verdicts" is an affront to our entire system of justice. In our system and in this case, the State bears the burdens of production and persuasion. In our system and in this case, the jury is charged with finding the facts. After receiving a finding of fact with which it doesn't agree, it is improper for

any party to rewrite history to support an order of restitution. The State did not carry their burden in showing by a preponderance of the evidence that Nelson's disorderly conduct caused Cynthia B. to seek medical care. As a result, the circuit court did not make its decision with a rational, demonstrated process to reach its conclusion. Now, the State intentionally disregards the role of the jury as fact finder and requests that this Court do the same.

CONCLUSION

Richard Nelson respectfully requests the Court vacate the medical expenses from the order of restitution.

Dated this 30th day of December, 2014.

Respectfully submitted,

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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 2,962 words.

Dated this 30th day of December, 2014.

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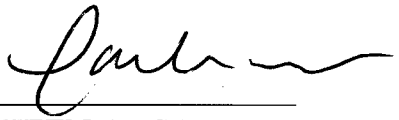

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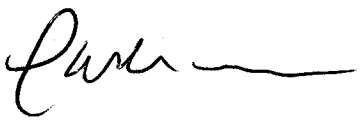

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