STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2015AP425-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRANK E. PILARSKI,

Defendant-Appellant.

On Appeal From an Amended Judgment of Conviction and Restitution Order Entered in the Waukesha County Circuit Court, the Honorable Kathryn W. Foster, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
E-mail velasquezm@opd.wi.gov
Attorney for Defendant-Appellant

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ISSUE PRESENTED

1. Did the trial court properly order as special damages, restitution for reduced income due to the victim's mother's decision to reject viable childcare alternatives and instead move from full to part-time employment?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case requires the application of well-established legal and constitutional principles to the particular facts of the case. Neither oral argument nor publication is warranted.

STATEMENT OF THE CASE

This appeal is taken from the amended judgment of conviction and restitution order entered in Waukesha County, the Honorable Kathryn W. Foster, presiding.

On June 17, 2013, the state charged Mr. Pilarski with a single count of first degree sexual assault of a child-contact with a child under age 13, contrary to Wis. Stat. § 948.02(1)(e). (1:1). According to the complaint, Mr. Pilarksi, who had been babysitting K.J.A. at his wife's in-home daycare, sexually assaulted K.J.A. sometime between March 1, 2013 and June 17, 2013. (1:1-2).

On February 27, 2014, pursuant to a plea negotiation, Mr. Pilarksi pled no contest to an amended information charging him with one count of sexual assault of a child under sixteen years of age, contrary to Wis. Stat. § 948.02(2). The case proceeded to sentencing on April 15, 2015. At that time, the court sentenced Mr. Pilarksi to twenty-five years in

prison, divided into fifteen years of initial confinement, followed by ten years of extended supervision. (45:39). The court scheduled a restitution hearing. (45:40).

A contested restitution hearing was held on July 11, 2014. (46). The parents of the victim requested a total of $25, 018.13 in restitution. (46:3; App. 103). The victims sought restitution for lost wages and medical expenses. (46:27-28; App. 127-28). The court granted the full amount of restitution requested. (46:31; App. 131).

Mr. Pilarksi does not dispute that $626.13 in restitution for out-of-pocket medical expenses is appropriate. Likewise, he does not dispute that $3,244 in lost wages due to A.A., K.J.A.'s mother, taking thirteen days off from work immediately following the allegations in order to pursue the charges and to arrange for alternative child-care is also appropriate. Mr. Pilarksi does, however, dispute that he must pay as restitution $21,168, the amount by which A.A's income was reduced when she decided to reject other viable childcare options and chose instead to work part-time rather than full-time.

STATEMENT OF THE FACTS

A.A., the mother of the victim in this case testified at the restitution hearing. Both of her children, K.JA., the victim in this case, and her younger child, C.A., had been cared for by Mr. Pilarski's wife at her in-home daycare. His wife had always been the primary caregiver, and Mr. Pilarksi became the caregiver for the children when his wife had to travel to California for an extended period of time to care for her ill daughter. (46:6; App. 106).

At the time of this case A.A. worked first shift as a full-time nurse for a surgeon at Retina and Vitreous Consultants. (46:6; App. 106). According to A.A. her hours varied, but she averaged eight to ten hours per day between 6 a.m. and 5 p.m., providing there was not an emergency. (46:7; App. 107). A.A.'s husband, a welder in Chicago, also worked first shift. (46:7; App. 107). According to A.A., her husband traveled further than Chicago for work on occasion and worked more hours than she did. (46:7; App. 107).

As a result of the charges, A.A. had to find a new childcare arrangement for her children. (46:10; App. 110). After the initial time off from work to make new childcare arrangements, A.A. returned to work at the same employer, but on a part-time basis, working three days per week instead of five as she had done previously. (46:10; App. 110).

A.A. testified that she made arrangements to work part-time because she would "not use private child care, period." (46:18; App. 118). A.A. considered a daycare center, and testified that she looked into two different ones. (46:18; App. 118). According to A.A. both of the daycare centers' hours were inconvenient for her and her husband's work schedules, which she stated were not flexible. (46:18; App. 118). She stated that although there were other daycare centers in her area that she had not looked into, "every single daycare is 6 to 6." (46:19; App. 119). According to A.A., the standard 6 a.m. to 6 p.m. hours did not work with her schedule because when she is in surgery she must be in the operating room by 6 a.m. (46:19; App. 119). A.A. indicated that daycare centers outside of her immediate area were not a feasible option due to travel times and because she was at a different clinic location almost daily. (46:19-20; App. 119-120).

Ultimately, A.A. decided to reduce the number of hours she worked and to share childcare with another parent. (46:18-20; App. 118-120). She testified that in addition to reducing the total number of hours she works per week, she made other changes to her work schedule in order to accommodate her new childcare arrangement. (46:10; App. 110). Specifically, A.A. testified that in order to accommodate her new childcare arrangement, she could no longer start work as early, and she had to leave even when there was an emergency surgery. (46:10; App. 110).

A.A. testified that she had thirteen days off from work immediately following K.J.A.'s disclosure of the assault. (46: 17; App. 117). At the time charges were filed, A.A.'s rate of pay was $31 per hour. (46:8; App. 108). Effective August 5, 2013, her rate of pay increased to $32 per hour. (46:8; App. 108). A.A. testified that from the time she returned to work on a part-time basis, until the time Mr. Pilarski was sentenced, she lost eighty-three days of work. (46:10-11; App. 110-111). According to A.A., out of those eighty-three lost days, seventy-three were after her rate of pay increased to $32/hour. (46:11; App. 111).

The circuit court concluded that the medical expenses, and the lost wages immediately following Mr. Pilarksi's arrest and the issuance of charges, clearly fell under the restitution statute. (46:26-29; App. 126-129). For the circuit court, the "more difficult analysis" was the remaining amount of $18, 688.[1] (46:29; App. 129).

[1] The circuit court cited the remaining amount as $18, 688. However, that amount, added to the other restitution amounts of $626.13 and $3,224, does not equal the total restitution of $25,018.13 that the court granted. That figure does not include eighty additional hours of work at $31/hour, to which A.A. testified.

The circuit court discussed the family's choice to reduce A.A.'s work hours instead of finding either an in-home provider or a daycare center. In relation to the viability of a daycare center, the court stated that given A.A.'s profession and the unpredictability of her hours, "no one would expect a nurse or a surgeon to stop at 6:00 or 5:30 in the middle of a surgery to go get their kids from daycare." (46:29; App. 129). Based on A.A.'s testimony, the circuit court took judicial notice that standard daycare hours are 6 a.m. to 6 p.m. (46:29; App. 129). The circuit court accepted A.A.'s testimony that those hours were not feasible with her and her husband's work schedule.

The circuit court recognized that the family could have gone to a private individual, which would have afforded the family more flexibility, but that it was difficult to argue with A.A.'s perception that it would be unsafe to send the children to a private, in-home provider. (46:30; App. 130). The circuit court, however, also recognized that there are many families who use private daycare without any issues. (46:30; App. 130). The trial court concluded that the "special circumstances unique to this case . . . . are special damages." (46:30; App. 130).

The circuit court stated that it was uncertain what a civil jury would do with A.A.'s decision to reduce her work hours instead of using a private daycare provider, but that it was hoping to exercise "equitable principles." (46:30-31; App. 130-131). It was "sure Mr. Pilarski [didn't] feel fortunate, but he [was] not facing a request for thousands of dollars of psychiatric care for the children because, [it] assume[d], of their youth . . . .when this happened." (46:31; App. 131). It stated that "[i]nstead we have parents who in some situations might be described as overprotective" but that it would not use that term because it believed they made the

decision based upon being victimized by Mr. Pilarski. (46:31; App. 131).

In order to effectuate a balance, the circuit court ordered the requested restitution for the reduced wages retrospectively, but not prospectively. (46:31; App. 131). The circuit court encouraged the parents to make other choices related to childcare that would not require A.A. to work part-time, but ruled that if the parents chose to maintain their current childcare arrangements, it would not require Mr. Pilarski to reimburse that decision moving forward. (46:31-32; App. 131-132).

ARGUMENT

I. The Circuit Court Cannot Order a Defendant to Pay as Restitution the Wages Lost as a Result of a Parent's Decision to Leave Full-Time Employment.

A. Introduction and Standard of Review

In this case, the court ordered Mr. Pilarski to pay restitution in the amount of $21,168 for wages lost by K.J.A.'s parent due to her decision to work reduced hours in order to facilitate a particular childcare arrangement. K.J.A.'s parent chose to reject any in-home, or "private" day cares, as well as daycare centers, and instead, returned to work part-time rather than full-time in order to share childcare with another parent. The issue presented in this case is whether the court properly found the lost income resulting from A.A.'s decision to be a special damage, thereby awarding restitution.

Interpretation of a statute and its application to a particular set of facts presents a question of law that this court reviews de novo. ***State v. Evans***, 2000 WI App. 178, ¶ 12,

238 Wis. 2d 411, 617 N.W.2d 220. This court reviews the amount of restitution to be ordered under the erroneous exercise of discretion standard of review. ***State v. Longmire***, 2004 WI App. 90, ¶ 16, 272 Wis. 2d 759, 681 N.W.2d 534. This court also reviews "the record to determine whether the circuit 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." ***Id***.

B. The circuit court exceeded its authority by finding that reduced income resulting from A.A.'s decision to reject available child care alternatives in favor of working part-time were special damages entitling her to restitution.

The purpose of restitution is to "return the victims to the position they were in before the defendant injured them." ***State v. Holmgren***, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). Pursuant to Wis. Stat. § 950.02(4)(a)2, the parents of K.J.A. are also victims of the offense entitled to applicable restitution.

The restitution statute considers lost wages in two separate subsections. Here, however, the only subsection applicable to the portion of the restitution at issue is Wis. Stat. § 973.20(5), which provides, in relevant part:

> In any case, the restitution order may require that the defendant do one or more of the following:
>
> (a) Pay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing.

> (b) Pay an amount equal to the income lost, and reasonable out-of –pocket expenses incurred, by the person against whom a crime considered at sentencing was committed resulting from the filing of charges or cooperating in the investigation and prosecution of the crime.

In the context of criminal cases, special damages "encompass 'harm of a more material or pecuniary nature' and represent the victim's actual pecuniary losses." ***Holmgren***, 229 Wis. 2d at 365, (quoting ***State v. Stowers***, 177 Wis.2d 798, 804, 503 N.W.2d 8 (Ct. App. 1993)). Special damages are also limited to those that are readily ascertainable pecuniary expenditures that could be recovered in some type of civil action. Wis. Stat. § 973.20(5)(a); *see* ***State v. Johnson***, 2005 WI App. 201, ¶ 12, 287 Wis. 2d 381, 704 N.W.2d 625.

In tort law, which is most analogous to the concept of restitution, special damages refer to "past and future medical, surgical, hospital and like costs," and in personal injury claims, "loss of time and earnings, expenses of drugs, nursing and medical care and similar items [are] considered 'special' damages. ***Stowers***, 177 Wis. 2d at 805. (internal citations omitted).

In this case, the circuit court appropriately ordered restitution for medical expenses. ***Id***. Likewise, the circuit court appropriately ordered restitution for A.A.'s lost income in the days immediately following the disclosure because the wages lost over the period of thirteen days were in relation to the need to find new child care as well as the prosecution of this case. ***Stowers***, 177 Wis. 2d at 805; *See* Wis. Stat. § 973.20(5)(b).

However, the circuit court's finding as a special damage the reduced income resulting from A.A. deciding to resolve her childcare needs by moving from full to part-time employment was error. "[R]estitution may not be imposed for speculative, unrealized, and unproven future losses." ***State v. Handley***, 173 Wis. 2d 838, 839, 496 N.W.2d 725 (Ct. App. 1993). In other words, there "must be a causal connection between the defendant's conduct and harm sustained by the claimant." ***State v. Hoseman***, 2011 WI App 88 ¶ 16, 334 Wis. 2d 415, 799 N.W.2d 479. The causal link "is established when the defendant's criminal act set into motion events that resulted in the damage or injury." ***Id***. ¶ 26. (internal quotation omitted). Moreover, a court may not order a defendant to pay general damages, which are defined as those that "compensate a victim for damages such as pain and suffering, anguish or humiliation***." State v. Behnke***, 203 Wis. 2d 43, 60-61, 553 N.W.2d 265 (Ct. App. 1996).

In ***Handley***, the circuit court awarded restitution for possible future psychological treatment. ***Handley*** 173 Wis. 2d at 841. This Court held that the circuit court erred when it awarded restitution for a speculated need for future counseling for which there was no evidence. ***Id*** at 839. There was no causal connection between the restitution that the court set and an injury sustained; rather, the amount of restitution the court set was purely arbitrary and based on a belief that the victims may require counseling in the future. ***Id***. at 844.

Similarly in this case, the circuit court erred when it awarded restitution for A.A.'s subjective belief that "private," in-home childcare was unsafe, and her unwillingness to make scheduling changes to accommodate the hours available at daycare centers, rather than an injury for which there was

evidence. Unlike the connection between Mr. Pilarksi's conduct and the need for A.A. to take time off from work to make new childcare arrangements and to cooperate with the prosecution, there was no causal connection between Mr. Pilarksi's conduct and the family's preference for A.A. to work part-time in order to share in the childcare.

The family had two viable alternatives to reduced work hours. First, it could have used an in-home childcare provider. The family's rejection of this option was not based on an injury, but rather a subjective belief that "private," in-home childcare was unsafe. (46:18; App. 118). Like the lack of evidence regarding the need for treatment in ***Handley***, there was no evidence presented at the restitution hearing that K.J.A. suffered any type of injury that required her mother to stay home and care for her. Likewise, there was no evidence that A.A. suffered any injury as a result of the offense that made it impossible for her to maintain the level of employment she held prior to the offense.

Even more attenuated was the family's refusal to use a daycare center. A.A. claimed that the industry standard hours of 6 a.m. to 6 p.m. did not work with her and her husband's work schedule. (46:18, 29; App. 118, 129). Notably, despite the claim that she and her husband could not accommodate a 6 a.m. to 6 p.m. daycare schedule, A.A. testified that in order to accommodate her childcare arrangements with the other parent, she could no longer start work as early and could no longer stay late, even if there was an emergency surgery. (46:10; App. 110). While Mr. Pilarksi's conduct caused the family's loss of childcare, it did not make all other forms of childcare impracticable. Rather, the family preferred to have A.A. stay home with the children part-time. Mr. Pilarski

should not be liable to pay restitution for the family's preferred childcare.

The circuit court concluded that under the unique circumstances of the case, the income lost as a result of shifting from full to part time, were special damages. (46:30; App. 130). The court also concluded that the need to make the decision was "foisted" on the family due to Mr. Pilarski's actions. (46:31; App. 131). Despite recognizing that objectively not all in-home daycares are unsafe, the court determined that the family's subjective belief that in-home childcare providers were unsafe, was reasonable. (46:30; App, 130).

There is no dispute that Mr. Pilarski's actions "foisted" upon the family the need for new childcare; nor is there any dispute that Mr. Pilarski is responsible for restitution for that thirteen day period of time in which A.A. missed work in order to cooperate with the filing of charges and to make new child care arrangements. However, Mr. Pilarksi is not responsible for restitution related to A.A.'s perception that all in-home daycares were unsafe, and therefore the only way to prevent future problems of the same nature was to return to work part-time in order to make child care arrangements with another parent. In-home daycare is not inherently unsafe, nor is it inherently less safe than other types of childcare.

While the family's perception regarding the safety of an in-home provider may be understandable, it was not based upon an evidenced injury. Sadly, a child could be assaulted in any setting, including his or her own home. Instead, the unwillingness to use an in-home provider seems to be more related to injury to feelings, which is an injury that is not compensable as restitution. *See* ***Behnke***, 203 Wis. 2d at 60-

61. Any stress and anxiety A.A. suffered in relation to future childcare arrangements as a consequence of the offense is in the nature of a "general damage," which is not subject to award under the restitution statute. ***Stowers***, 177 Wis. 2d at 804-806, (Ct. App. 1993).

Likewise, the family's unwillingness to make for a daycare center, the same scheduling accommodations they made for the other parent, was not something that Mr. Pilarksi "foisted" upon them through his actions. The family's preference to work out childcare in this way, despite the availability of other options, does not qualify as a special damage. Therefore, Mr. Pilarski cannot be ordered to pay restitution for wages lost as a result of A.A. rejecting alternate child care arrangements and returning to work part-time.

In addition to the circuit court's erroneous finding that the reduced income qualified as a special damage, it also erred when it applied "equitable principles" to restitution. The court began its discussion by stating that it wanted to effectuate an "equitable" outcome. (46:30-31; App. 130-131). It noted that while it is common for victims of sexual assault to require ongoing psychological treatment; and for restitution to be ordered to pay for that cost, here, there was no restitution being sought in relation to psychological services in this case. (46:31; App. 131).

Moreover, the circuit court speculated and hoped, that given K.J.A.'s young age, such treatment would be unnecessary and therefore, Mr. Pilarski would not have to pay restitution for psychological treatment. (46:31; 131). Accordingly, it appears that the circuit court instead ordered Mr. Pilarski to pay restitution for A.A.'s decision to work part-time since it believed that he would not have to pay for

any ongoing psychological treatment, given the young age of the victim. (46:31; App. 131). The circuit court did, however, acknowledge that not all in-home daycares are unsafe and that there were options available to the family other than A.A. working part-time. (46:31; App. 131). To strike a balance, the court capped the restitution to wages lost through sentencing, and encouraged the family to use alternate childcare arrangements moving forward. (46:31; App. 131).

The circuit court's decision seemed to rest, in part, on its belief that because the family did not seek restitution for psychiatric or psychological services, that Mr. Pilarksi, unlike other defendants, would not be ordered thousands in restitution for those costs. However, the absence of such a request does not make Mr. Pilarski responsible for other, more attenuated costs. In other words, Mr. Pilarski should not be ordered restitution to make things fairer. *See* ***Stowers***, 177 Wis.2d at 804.

In addition, contrary to the court's belief, the family was not precluded from seeking restitution for psychiatric treatment in the future. *See* Wis Stat. § 973.20(4m); ***State v. Handley***, 173 Wis. 2d 838, 496 N.W.2d 725 (Ct. App. 1993). Therefore, the court could not have known at the time of ordering restitution whether Mr. Pilarski would ever be responsible for restitution in relation to psychological or psychiatric treatment. The circuit court's attempt to be equitable was misplaced, as Mr. Pilarksi could only be ordered restitution for actual losses related to the offense.

CONCLUSION

Mr. Pilarski respectfully requests that for the reasons stated above that the court reverse the decision of the circuit court granting restitution in the amount of $25, 018.13 and order that restitution be set at $626.13 for medical expenses, and $3,224 for thirteen days of missed work.

Dated this 2nd day of June, 2015.

Respectfully submitted,

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
E-mail velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

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 3,568 words.

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 2nd day of June, 2015.

Signed:

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
velasquezm@opd.wi.gov
Attorney for Defendant-Appellant

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 2nd day of June, 2015.

Signed:

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355
Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4300
E-mail velasquezm@opd.wi.go
Attorney for Defendant-Appellant

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