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STATE OF WISCONSIN
COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT II

Case No. 2015AP425-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRANK E. PILARSKI,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED
IN THE WAUKESHA COUNTY CIRCUIT COURT, THE
HONORABLE KATHRYN W. FOSTER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Frank E. Pilarski's statement of the case is sufficient to frame the issues on appeal. As Respondent, the State exercises its option not to present an additional statement, but will supplement facts as necessary in its argument. *See* Wis. Stat. § 809.19(3)(a)2.

ARGUMENT

THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN ITS AWARD OF RESTITUTION.

A. Standard of review and relevant law.

Pursuant to Wis. Stat. § 973.20(1r), the trial court "shall" order restitution for a crime considered at sentencing "unless the court finds substantial reason not to do so and states the reason on the record." "The determination of the *amount* of restitution to be ordered (and thus whether a victim's claim should be offset or reduced for any reason) is reviewed under the erroneous exercise of discretion standard." *State v. Longmire*, 2004 WI App 90, ¶16, 272 Wis. 2d 759, 681 N.W. 2d 534 (emphasis in original). In reviewing an exercise of discretion, this Court "examine[s] 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.*

"A primary purpose of restitution is to compensate the victim." *Id.* "[A] court may require a defendant to pay only special damages the victim sustains which evidence in the record substantiates." *State v. Holmgren*, 229 Wis. 2d 358, 365, 599 N.W. 2d 876 (Ct. App. 1999). Special damages "represent the victim's actual pecuniary losses." *Id.* The restitution statute does not allow a victim to recover general damages, which are

damages for things like pain and suffering. *Id.* The victim must prove her claim by a preponderance of the evidence. Wis. Stat. § 973.20(14)(a).

B. The circuit court properly exercised its discretion in awarding AA restitution for the loss of wages she incurred as a result of Pilarski sexually assaulting her four-year-old daughter.

In June 2013, AA and MA's four-year-old daughter, KA, had been going to daycare at Pilarski and his wife's in-home daycare for about four years (3:2; 44:12¹). Pilarski's wife, Pamela Pilarski, was the primary caregiver at the daycare, but in March 2013, she went to California to take care of the Pilarskis' daughter, who was fighting cancer (3:2). When Pamela left, Pilarski took over watching the children at the daycare (3:2). Pilarski admitted that during this time he sexually assaulted KA (19; 44:8-9, 13).

Following Pilarski's sentencing, the circuit court held a restitution hearing at which the State presented AA's claim for restitution in the amount of \$25,018.13 (46). The claim included \$626.13 for medical expenses incurred for physical examinations of both of AA's children who were in childcare at the Pilarskis' home, \$3224 to compensate AA for vacation time she used to stay home with her children after Pilarski was charged with the assault and before she found new childcare, and \$21,168 for AA's lost wages as a result of having to reduce her full-time employment to part-time employment (46:5-19). On appeal, Pilarski challenges only the \$21,168 amount of restitution, arguing that Pilarski is not responsible for AA's

¹ The criminal complaint formed the factual basis for the plea (44:12). See *State v. Black*, 2001 WI 31, ¶14, 242 Wis. 2d 126, 624 N.W. 2d 363 (allowing the complaint to form the factual basis for a plea).

shift to part-time work.² The circuit court properly exercised its discretion in awarding AA the entire amount of restitution that she requested.

Pilarski argues that the circuit court erroneously exercised its discretion in awarding AA the \$21,168 sum because there was no “causal connection between Mr. Pilarski’s conduct and the family’s preference for A.A. to work part-time in order to share in the childcare.”³ Pilarski argues that AA should have returned to work full-time and either found another in-home childcare for her children or used a daycare center.⁴ Although Pilarski concedes that by sexually assaulting KA, he forced AA to find new childcare for her children, he rejects her new fear of in-home childcare providers as “not based upon an evidenced injury.”⁵ Consequently, Pilarski argues that AA’s loss of income is more akin to a general damage, which is not permitted by statute.⁶ *See* Wis. Stat. § 973.20(5)(a); *State v. Behnke*, 203 Wis. 2d 43, 60-61, 553 N.W. 2d 265 (Ct. App. 1996). Pilarski is mistaken.

At the restitution hearing, AA testified that before Pilarski sexually assault KA, AA worked five days a week as a registered nurse in an operating room, but after the assault she can work only three days a week (46:6, 10, 18). AA testified that before the assault, her children were cared for by the Pilarskis, but she lost that childcare when the charges were filed against Pilarski (46:9). AA testified that after the charges were filed, she had to stay home from work until she was able to make new childcare arrangements (46:9-10). AA stated that her husband, MA, worked as a welder in Chicago (46:7). AA testified that

² Pilarski’s Br. at 6-13.

³ Pilarski’s Br. at 10.

⁴ Pilarski’s Br. at 10.

⁵ Pilarski’s Br. at 11.

⁶ Pilarski’s Br. a 9-13.

after Pilarski sexually assaulted KA, she was unwilling to use another in-home daycare (46:19). AA testified that when she needed to be in the operating room at work, she was required to be there at six in the morning.⁷ AA also testified that the childcare centers that she found had inflexible hours, operating from six in the morning until six in the evening, which did not work with her work schedule (46:18-19). As a result of these three issues – the need for new childcare, a fear of in-home daycares and childcare centers unworkable operating hours – AA reduced her hours of employment to part-time and exchanged childcare duties with another mother (46:19). This exchange resulted in AA watching KA and CA, along with another family’s children, two days a week, while another mother watches her own children, along with KA and CA, three days a week so that AA can go to work (46:10, 19). At the time of the restitution hearing, AA had lost over \$21,000 in wages from her reduction in hours (46:10-11, 15).

The court took judicial notice of a daycare’s standard operating hours of six in the morning until six in the evening and noted that “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). The court also noted that while it was not criticizing in-home childcare providers, it could not argue with AA’s perception that such a provider would not keep her children safe “because [she] thought when [she] hired the Pilarskis that they were safe and [she] had done due diligence” (46:30). The court accepted AA’s request for

⁷ Pilarski points out that at one point during the restitution hearing, AA said that she can no longer work “as early” as she used to be able to do in order to support his claim that AA should put her children in a daycare center. Pilarski’s Br. at 10. The State concedes that AA testified that she cannot work “as early” (46:10), but Pilarski ignores that AA also testified that a daycare center does not work for her family because “every single daycare is 6 to 6. And 6 to 6 does not work for us. When I am in the operating room I am in the operating room by 6 am” (46:19).

restitution because she “made a decision best for them and best for [her] family foisted on them because the entire family in effect was victimized by Mr. Pilarski” (46:31). The court did not leave the restitution order open-ended, but instead capped the request at the amount of lost wages that AA had incurred up until the restitution hearing (46:31-32).

Pilarski’s argument that the court erred because its order was based on AA’s “subjective belief that ‘private,’ in-home childcare was unsafe... rather than an injury for which there was evidence”⁸ is mistaken for at least two reasons.

First, AA’s concern for her children’s childcare placement is an appropriate factor that the court may consider in assessing the reasonableness of AA’s restitution request. In *Behnke*, the defendant sexually assaulted and battered the victim in the defendant’s home. 203 Wis. 2d at 48. The victim requested restitution for the cost of a dead bolt lock for *her* home “to help her feel safe” after the attack. *Id.* at 57. The victim testified that she purchased the lock two months after the assault because the defendant knew where she lived and that, while the defendant was in custody at the time, she feared he would escape. *Id.* at 60. This Court approved of the request for restitution because the cost of the lock was a special damage, approved of by statute. *Id.* at 60-61. This Court noted that general damages, such as compensation for pain and suffering, are not permitted, but restitution for “any specific expenditure by the victim paid out because of the crime ... is appropriate.” *Id.* at 61.

AA told the presentence investigation (PSI) writer that before she chose the Pilarskis as her children’s in-home childcare provider, she searched online for any court actions

⁸ Pilarski’s Br. at 9.

they may have been involved in (33:5).⁹ See *State v. Buchanan*, 2013 WI 31, ¶3, 346 Wis. 2d 735, 828 N.W. 2d 847 (allowing parties to reference relevant information in a PSI on appeal). AA told the PSI writer that MA's cousin's family also sent their children to the Pilarskis' home, which made her feel it was safe (33:5). AA told the PSI writer that she interviewed the Pilarskis; AA thought Pamela was "wonderful" and that Pilarski was "very involved" (33:5). As a direct consequence of Pilarski's crime, AA needs childcare and no longer feels safe using an in-home provider. In other words, like the victim in *Behnke* who felt unsafe because of the defendant's crime, AA has suffered specific, foreseeable, quantifiable damage as a result of Pilarski's actions.

Second, and relatedly, it is incredible for Pilarski to suggest that AA has not suffered an injury.¹⁰ The evidence from the restitution hearing, as well as AA's statements at sentencing and to the PSI writer, establish that AA lost trust in in-home daycare providers because she had trusted Pilarski with her children, and he violated that trust by sexually assaulting her daughter. The injury here was acute: AA researched the Pilarskis as childcare providers and Pilarski then sexually assaulted her four-year-old daughter (3; 33:5). After the assault, the family still needed childcare, but understandably no longer felt safe in a stranger's home (33:5; 46:18). AA also explained why a traditional daycare provider would not work for their family (46:18-19). Pilarski sexually assaulted KA, causing the whole family specific injuries. Beyond the medical expenses, and the lost vacation days, AA articulated her lost income that Pilarski caused by making her fearful to trust an in-home daycare provider. AA certainly proved her claim by a preponderance of the evidence. See Wis. Stat. § 973.20(14)(a).

⁹ The State's references are to the amended presentence investigation report, as discussed at sentencing (45:2-4)

¹⁰ Pilarski's Br. at 9-11.

In addition, Pilarski argues that he “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.”¹¹ But this argument is also flawed. AA did not argue that all in-home daycares are unsafe, only that she now will not send her children to one because of her experience with the Pilarskis (46:18). Because she researched the Pilarskis before sending her children to their home, she thought that she could trust them (33:5). Sadly, that was not the case. Pilarski sexually assaulted KA and that caused AA’s mistrust of in-home daycares. *See State v. Rash*, 2003 WI App 32, ¶6, 260 Wis. 2d 369, 659 N.W. 2d 189 (stating that a victim must prove a causation between the defendant’s actions and the damage). It is axiomatic that a natural consequence of an in-home daycare provider’s sexual assault of a child is that the child’s parent would no longer trust in-home daycare providers.

Pilarski’s argument that AA’s restitution request was tied to her “stress and anxiety” is also misplaced.¹² The restitution was for wages AA lost as a direct result of Pilarski’s crime, not for general damages for emotional harm. *See Holmgren*, 229 Wis. 2d at 364-65 (stating that specific, but not general, damages are permitted under the restitution statute). The circuit court limited the request to the time between the charge and the restitution hearing, although AA presumably continued to lose wages after the hearing (46:32). AA proved her claim and the circuit court properly exercised its discretion in awarding these specific, special damages as contemplated by Wis. Stat. § 973.20(5)(a).

¹¹ Pilarski’s Br. at 11.

¹² Pilarski’s Br. at 11-12.

Pilarski's final argument pertains to the circuit court's remarks surrounding potential psychiatric costs that Pilarski could have, but did not, face.¹³ At the restitution hearing, the court stated that Pilarski "is not facing a request here for thousands of dollars of psychiatric care for the children because, I assume, of their youth and [KA's] young age when this happened" (46:31). Pilarski argues that the court's statement somehow demonstrates an erroneous exercise of discretion because the court was trying "to make things fairer."¹⁴ The State disagrees. The court stated only that, "I am sure Mr. Pilarski doesn't feel fortunate, but he is not facing" a request for psychiatric care (46:31). This statement does not show that the court attempted to make up for the lack of a request for psychiatric care by granting restitution for lost wages; instead, it is solely an observation that in many cases, a similarly-situated defendant would have faced substantial restitution costs for psychiatric care.

In sum, the record as a whole demonstrates that the circuit court properly applied the law to the facts and properly concluded that AA amply demonstrated that Pilarski caused her to lose the money that she requested as restitution.

¹³ Pilarski's Br. at 13.

¹⁴ Pilarski's Br. at 13.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of conviction.

Dated this 3rd day of September, 2015,

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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 2,397 words.

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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 3rd day of September, 2015.

Katherine D. Lloyd
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