STATE OF WISCONSIN

C O U R T OF APPEALS

DISTRICT II

Case No. 2015AP425-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRANK E. PILARKSI,

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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REPLY BRIEF OF DEFENDANT-APPELLANT

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CASES CITED

State v. Behnke,
203 Wis. 2d 43, 553 N.W.2d 43
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ARGUMENT

I. AA's Decision to Change from Full to Part-Time Employment Is Too Attenuated; Therefore, She is Not Entitled to Restitution For Income Lost Due to Her Reduction of Work Hours.

In his opening brief, Mr. Pilarski conceded that he is responsible for some restitution in this case. (Pilarski's Br. at 11). Specifically, he is not contesting restitution for medical expenses, or for AA's lost wages during the period of time immediately following the disclosure and she had to find new child care. (Pilarski's Br. at 11).

The state relies on ***State v. Behnke***, 203 Wis. 2d 43, 553 N.W.2d 43 (Ct. App. 1996), to support its argument that the circuit court properly determined that AA's decision to work part-time was an injury within the context of restitution. (State's Br. at 6). In ***Behnke***, the victim requested $20.98 for a new lock. ***Id***. at 57. She testified that she bought the lock following the attack because the defendant knew where she lived and she wanted a stronger lock. ***Id***. at 60. Although the defendant was in jail at the time, the victim testified that she was concerned that he would escape because he had told her he would not go back to prison. ***Id***. This Court affirmed the circuit court's finding that the need for a lock was a consequence of the defendant's acts because there was proof of causation. ***Id***. at 60-61.

The state draws an analogy between the victim in ***Behnke*** feeling unsafe and AA feeling unsafe as a result of the crime, concluding therefore, that reducing work hours to accommodate a specific child care arrangement was a quantifiable damage, like the lock. (State's Br. at7). The lock

in ***Behnke***, however, is more analogous to the period of time in which AA had to look for new child care. Because of Mr. Pilarski's conduct, her children were not safe in the Pilarski home and she changed child care providers, which required her to be off from work in order to care for her children while she made new arrangements. Mr. Pilarski does not dispute that restitution is owed for that period of time.

However, the causation between Mr. Pilarksi's conduct, and AA's decision to reduce her work to part-time, is attenuated. Many decisions that a victim of a crime makes may be, in some part, associated with the crime. Does that then require defendants to pay for every life decision related to the offense? For example, would the defendant in ***Behnke*** be required to pay for increased rent if the victim in that case decided to relocate to a new apartment or city in order to feel safer? While it may be understandable for a victim to move, the life-changing decision would be too attenuated, and therefore, the causal nexus required for restitution would be insufficient. Likewise, AA's decision to alter her family's lifestyle is too attenuated. The family had other childcare options available, but chose the one that required AA to reduce her work hours.

The state argues that the evidence was clear that AA had lost trust in in-home childcare providers, and that her fear of in-home providers resulted in lost wages. (State's Br. at 7). Mr. Pilarski agrees that his conduct created a situation where AA had to find new child care. Likewise, he agrees that he is liable for any lost wages attributed to AA finding new childcare. However, AA's lost wages resulting from the decision to work part-time, and reject other childcare options is not compensable as restitution.

The state argues that the reduced wages for changing work hours is compensable because it is axiomatic that a natural consequence of a sexual assault of a child at an in-home daycare is that the child's parent would no longer trust in-home providers. (State's Br. at 8). While it is an obvious consequence that AA would remove her children from Mrs. Pilarski's care, it is not a natural consequence that she would reduce her work hours in order to accommodate her preferred childcare arrangement.

The fact that it is understandable that the family would prefer this arrangement, does not necessarily tie it to a compensable injury under the restitution statue. There was no testimony from any treating physician, therapist, or psychologist that KJA required her mother to remain home with her, or that she would be unable to attend daycare. Likewise, there was no evidence that AA's mental health suffered to the extent that she could not leave her child in any daycare setting.

Moreover, AA's inconsistent testimony further illustrates the attenuation of her decision to return to work part-time from the crime. Relegated to a footnote in the State's brief, it concedes that AA testified that she changed her work schedule to accommodate her new childcare arrangement. (State's Br. at 5; 46:10). She specifically testified that she can no longer start work as early, and she cannot stay late, even if there was an emergency surgery. (46:10). This testimony directly conflicts with AA's contention that more traditional daycare did not work for her family because the earliest she could bring her children was 6 a.m. and there were times when she would need to be at work at 6 a.m. (46:19).

The state seems to argue that AA's testimony that daycare centers do not work because she needs to be in the operating room by 6 a.m. somehow overcomes the aforementioned inconsistent testimony. It does not. AA's arrangement with the other parent, likewise, does not allow her to get to work early enough to be in surgery by 6 a.m., nor does it allow her to stay late. (46:10). This is the same inflexibility that she explained prevented the family from using a daycare center. (46:19). Accordingly, the reduction in work hours is even more attenuated from the offense because the private arrangement made with another parent does not cure the concern that AA expressed regarding the flexibility of a daycare center, thus making the causal nexus insufficient.

Finally, Mr. Pilarksi maintains that the circuit court erred by applying "equitable principles" to its determination of restitution. (Pilarksi Br. at 12; 46:30-31). The state, in its response, disagreed with this notion, but failed to address the entirety of the court's discussion regarding the "equitable principles" at play when it decided to impose the restitution. (State's Br. at 9). The state selected the single statement that Pilarksi "is not facing a request here for thousands of dollars of psychiatric care for the children because, I assume, or their youth and [KA's] young age when this happened[,]" to argue that it was "solely an observation" made by the court to demonstrate that a similar defendant would have potentially faced substantial costs for psychiatric care. (State's Br. at 9).

However, this was not a mere observation from the circuit court. Absent from the state's argument was any mention of the court's lengthier discussion rationalizing its decision to impose restitution. The circuit court explicitly recognized that not all in-home providers are inherently unsafe, and that the family had other options available to them. (46:31). However, because the court did not believe

that Mr. Pilarski would have to pay psychiatric bills, in order to balance the situation, the court granted restitution retrospectively, but not prospectively. (46:31-32; App. 131-132). Contrary to the state's assertion, the court was not simply observing that Mr. Pilarski could have been liable for restitution for psychiatric care under different circumstances; it was using that to rationalize the restitution here. Accordingly, the restitution order is based on an erroneous exercise of discretion.

CONCLUSION

For the reasons set forth in this brief, and his brief-in-chief, Mr. Pilarski respectfully requests that this court reverse the restitution order of the circuit court and order restitution to be set at a total of $3,850.13 for medical expenses and thirteen days of missed work.

Dated this 29th day of September, 2015.

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 1,302 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 29th day of September, 2015.

Signed:

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