STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2015AP000498-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

GUADALUPE RONZON,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM AN ORDER FOR RESTITUTION ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE JUDGE JOHN SIEFERT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Has Ronzon properly preserved any issue for appellate review?

   This question relates only to appeal and was not before the trial court.

2. Did the trial court erroneously exercise its discretion in establishing the amount of restitution ?

   This question was not raised to the trial court by post-conviction motion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. Argument will be unnecessary, pursuant to Wis. Stats. (Rule) §809.22(2)(a)2; the decision will not meet the criteria for Wis. Stats. (Rule) §809.23(1)(a) and (b).

STATEMENT OF THE CASE

On October 4, 2013, A.E. reported that she had been driving on the Lapham Street ramp of I-43 north, when she was struck from behind by another vehicle. The impact caused moderate damage to A.E.'s car and embedded part of the striking vehicle's grill into A.E.'s rear bumper. (R2) The driver of the striking car stopped, looked at the damage, then drove off again, without providing A.E. with the information required by law. (*Id.*) About 30 minutes later, a Milwaukee police officer stopped a Nissan automobile which had front end damage; a Milwaukee County Sheriff's deputy who responded determined that that vehicle was missing a portion of its grill, consistent with that embedded in A.E.'s car. (*Id.*) The driver of the Nissan was identified as Guadalupe Ronzon. (*Id.*) Ms. Ronzon admitted being involved in an accident, but indicated she thought she had hit a traffic pole. (*Id.*) Ms. Ronzon admitted drinking, was found to be impaired, and was cited for Operating while under the Influence of an Intoxicant and Operating with a Prohibited Alcohol Concentration; she later was charged with Duty Upon Striking Occupied or Attended Vehicle, contrary to Wis. Stat. § 346.67(1). (*Id.*)

On September 10, 2014, Ms. Ronzon pled guilty to the Duty Upon Striking charge in Milwaukee County Circuit Court case 14CT000497. (R1) Judge Siefert accepted her plea and found her guilty; sentencing was set over to October 14, 2014. (*Id.*) Ms. Ronzon failed to appear on that date, and a bench warrant was issued for her arrest.

Ms. Ronzon later was returned to court on the warrant. Sentencing occurred on December 22, at which time Judge Siefert imposed sentence and scheduled a restitution hearing.

(R1) The restitution hearing later was reset for A.E. to appear. (*Id.*) On February 9, 2015, A.E. appeared and testified at the restitution hearing. After hearing A.E.'s testimony, Judge Siefert set restitution at $8902.80. (*Id.*; R10)

Ms. Ronzon filed neither a Notice of Intent to Seek Post-Conviction Relief nor a post-conviction motion, under Wis. Stats. §§ 973.19 or 809.30. (R1) A Notice of Appeal was filed on March 11, 2015. (R13)

It is the State's position that by failing to bring a post-conviction motion challenging the establishment of restitution, Ronzon has forfeited her ability to raise the issue on appeal. It is further the State's position that, should the court exercise its authority to hear the issue notwithstanding the failure of preserving the issue below, the appeal should be denied on two grounds: first, the transcript of the sentencing hearing is not part of the record on appeal; second, Ronzon's contention—that documentary evidence must be submitted in support of a restitution request—is without legal support and is in error.

ARGUMENT

I. BECAUSE RONZON DID NOT BRING A MOTION CHALLENGING RESTITUTION IN THE TRIAL COURT, SHE HAS NOT PRESERVED THE ISSUE FOR APPEAL

A. Ronzon's Brief is Deficient

As an initial matter, the State submits that Ronzon's Brief-in-Chief is inadequate under the rules of appellate procedure.

Ronzon challenges the court's use of discretion at sentencing, in setting the amount of restitution. Her brief, however, contains no citations to the record, in violation of Wis. Stats (Rule) § 809.19(1)(e). She refers to the transcript of the restitution hearing, but that transcript is not part of the record on appeal. She attaches a variety of documents as her appendix—including a transcript—none of which are in the

appellate record. Ronzon asserts that the non-transcript items are "evidence presented in support of victim's request for restitution" (Brief of Defendant-Appellant, Index to Appendix), the court docket, however, does not reflect that they were presented to the court for its review. (R1)

The rules of appellate procedure require an appellant to include in the appendix those portions of the record which are essential to an understanding of the issues raised. Wis. Stat. (Rule) § 809.19(2). However, a party may not include non-record items in an appendix in an effort to supplement the record. *See, e.g. Forman v. McPherson*, 2004 WI App 145, ¶6, n.4, 275 Wis. 2d 604, 685 N.W.2d 603.[1] It is the State's position that the items in Ronzon's appendix are not properly before the court and should not be considered on appeal.

Moreover, much of Ronzon's argument boils down to a contention that a victim must present documentary evidence before claims of loss can be found credible. However, she offers no legal authority in support of her position. As this court has repeatedly noted, it may choose not to address arguments which are inadequately briefed. *See*, *Mount Horeb Community Alert v. Village Board of Mount Horeb*, 2002 WI App 80, ¶ 19, 252 Wis. 2d 713, 726, 643 N.W.2d 186; *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

B. Because Ronzon Did Not Bring A Post-Conviction Motion Challenging The Restitution Order, This Appeal Should Be Dismissed.

Wis. Stat. (Rule) § 809.30(2)(h) provides that a person pursuing an appeal in a criminal case must first preserve the issue in the trial court, unless the grounds for relief are sufficiency of the evidence or issues previously raised. Where the issue to be challenged relates to the sentence imposed, the motion must be brought in the trial court consistent with the parameters of Wis.

[1] A party may include copies of relevant secondary legal authority in the appendix as a convenience to court and counsel. *See State v. Williams*, 2002 WI 58, ¶ 8 n.4, 253 Wis. 2d 99, 644 N.W.2d 919, and must include a copy of citable, unpublished opinions.

Stat. § 973.19.[2] Such a motion is a condition precedent to challenging the sentence on appeal. *See*, *State v. Meyer*, 150 Wis.2d 603, 604, 442 N.W.2d 483 (Ct. App. 1989).

As applicable here, Ronzon had the opportunity to address the amount of restitution at the February 9, 2015, hearing. The issue on appeal, however, is not the amount, but—because restitution orders are vested in the discretion of the trial court--whether the trial court properly exercised its discretion in entering the order.[3] The factors relevant to that determination—whether the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach," *see State v. Jenkins*, 2007 WI 96, ¶ 30, 303 Wis. 2d 157, 736 N.W.2d 24—have not yet been addressed below.

II. RONZON HAS NOT ESTABLISHED THAT THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION IN SETTING RESTITUTION

Should this court decide to address the merits of Ronzon's appeal, notwithstanding her forfeiture, it is the State's position that the appeal should be denied, because she has not met her burden of showing that the trial court acted improperly.

A. Standard of Review

An order for restitution is reviewed under the erroneous exercise of discretion standard. *State v. Haase*, 2006 WI App 86, ¶ 5, 293 Wis. 2d 322, 716 N.W.2d 526. The appellate court will reverse the discretionary decision only if the trial court applied the wrong legal standard or did not ground its decision

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[2]In relevant portion, Wis. Stat. § 973.19 provides,

> 973.19(1)(1)973.19(1)(a)(a) A person sentenced to imprisonment or the intensive sanctions program or ordered to pay a fine who has not requested the preparation of transcripts under s. 809.30 (2) may, within 90 days after the sentence or order is entered, move the court to modify the sentence or the amount of the fine.
>
> 973.19(1)(b) (b) A person who has requested transcripts under s. 809.30 (2) may move for modification of a sentence or fine under s. 809.30 (2) (h).

[3] *State v. Haase*, 2006 WI App 86, ¶ 5, 293 Wis.2d 322, 716 N.W.2d 526.

on a logical interpretation of the facts. *State v. Behnke*, 203 Wis. 2d 43, 58, 553 N.W.2d 265 (Ct. App. 1996).

B. Because The Appellate Record Does Not Include The Transcript Of The Restitution Hearing, This Court Must Assume The Trial Court's Ruling Is Correct.

"Appellate review is limited to the record before the appellate court." *Duhame v. Duhame*, 154 Wis. 2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989). The appellant bears the burden to ensure that the record is sufficient to address the issues raised on appeal. *Lee v. LIRC*, 202 Wis. 2d 558, 560 n.1, 550 N.W.2d 449 (Ct. App. 1996). When the record is incomplete in connection with an issue raised by the appellant, the reviewing court must assume the missing material supports the trial court's ruling. *See State v. Holmgren*, 229 Wis. 2d 358, 362 n.2, 599 N.W.2d 876 (Ct. App. 1999); *State v. Benton*, 2000 WI App. 81, ¶ 10, 243 Wis. 2d 54, 625 N.W.2d 923, *Duhame v. Duhame*, *supra*; *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). Specifically, in the absence of a transcript, the appellate court will assume, that every fact essential to sustain the trial judge's exercise of discretion is supported by the record. *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 641, 273 N.W.2d 233, 239 (1979). *See also Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981).

Here, the appellate record does not contain a transcript of the restitution hearing at issue. It is the State's position that Ronzon's failure to ensure the appellate record is complete should be fatal to her appeal.

C. The Legal Premise Underlying Ronzon's Argument Is Incorrect

Finally, it is the State's position that Ronzon's appeal should be denied because her legal premise is incorrect.

Ronzon acknowledges that A.E. appeared at the restitution hearing and gave testimony to the court about her loss, a fact which is substantiated by the record. (Brief of Defendant-Appellant, pp. 5-6; R1). Essentially, her legal claim is that Judge Siefert erroneously exercised his discretion

because, (1) A.E's testimony contained inconsistencies; and (2) A.E. did not present documentary evidence of at least some of those losses. (Brief of Defendant-Appellant, pp. 5-6)

1. There is no legal requirement that a victim substantiate her loss with documentary evidence

The first problem underlying Ronzon's argument is that there is no legal requirement that A.E. substantiate her losses with documentary evidence.

WIS. STAT. § 973.20(1r) (2013-2014) provides that,

> When imposing sentence or ordering probation for any crime….for which the defendant was convicted, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing…unless the court finds substantial reason not to do so and states the reason on the record.

Restitution hearings are designed to be informal proceedings, and rules of evidence, other than rules relating to privilege, do not apply. *State v. Madlock*, 230 Wis. 2d 324, 335, 602 N.W.2d 104 (Ct. App. 1999); *see also*, *State v. Pope*, 107 Wis. 2d 726, 321 N.W.2d 359 (1982). Wis. Stat § 973.20(14)(a) provides that the victim must prove the loss sustained by a preponderance of the evidence. It does not, however, mandate what sort of evidence she must submit to carry that burden.

Ronzon seems to contend that written verification of loss is required. She submits no authority for that position, however, and the statute imposes no such burden. Here, Ronzon acknowledges that A.E. testified about her losses (Brief of Defendant-Appellant, pp. 5-6). Her testimony is competent evidence as to the extent of her losses. Certainly, receipts or other written documentation is one method of establishing loss; but sworn testimony is another. *See, e.g.*, WIS JI-Criminal 103: Evidence Defined.

2. As Finder of Fact, Judge Siefert was empowered to resolve any inconsistencies in A.E.'s testimony

Ronzon also argues that Judge Siefert abused his discretion in setting restitution, because there were "many inconsistencies" in A.E.'s testimony. (Brief of Defendant-Appellant, p. 6). That may be correct; however, it does not render her or her statements of loss incredible. When testimony is presented, it is the judge's role, as finder of fact, to determine the witness's credibility, what weight should be given that testimony and any other evidence presented, and to resolve any inconsistencies that occur in in the witness's testimony. *State v. Bowden*, 2007 WI App 234, ¶ 14, 306 Wis. 2d 393, 742 N.W.2d 332. The judge, having the opportunity to personally observe the witness, is in the best position to evaluate her credibility, first hand. *See, e.g. State v. Benoit*, 83 Wis.2d 389, 398, 265 N.W.2d 298 (1978). Here, Judge Siefert was in that "best position:" he had the opportunity to listen to the questions put to A.E. and her answers, to evaluate her testimony and her credibility, and to resolve any inconsistencies that appeared. That he did so does not constitute an abuse of discretion.

CONCLUSION

For the reasons herein, the State asks that this court find that Ronzon failed to preserve the issues on appeal in the trial court and dismiss this appeal. Should this court chose to address the issue raised, the State asks that the appeal be denied.

Dated this _____ day of _____, 2015.

Respectfully submitted,

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_____
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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 word count of this brief is 2,268.

_____ _____

Date Karen A. Loebel
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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 s. 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.

_____ _____

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