STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Appeal No. 2016AP000177 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TERRY C. CRAIG JR.
Defendant-Appellant.

ON APPEAL FROM A RESTITUTION ORDER
ENTERED BY THE CIRCUIT COURT FOR LA CROSSE COUNTY
THE HONORABLE GLORIA DOYLE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT, TERRY C. CRAIG JR.

Respectfully submitted,
John Matousek
Attorney for Defendant
State Bar No.: 1009195
Matousek & Laxton Law Office, S.C.
123 N. Water Street
Sparta, WI 54656
(608) 269-0501
(608) 269-0409 (Fax)

STATE OF WISCONSIN COURT OF APPEALS

STATE OF WISCONSIN,
Plaintiff-Respondent,
V.
Appeal No.: 2016AP177 CR
Circuit Court Case No.: 2015CM458

TERRY C. CRAIG,
Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

John Matousek, Attorney, State Bar No. 1009195, Matousek & Laxton Law Office, 123 N Water Street, Sparta, WI 54656, (608) 269-0501, matouseklaw@centurytel.net, Attorney for Defendant-Appellant.

TABLES OF CONTENTS

CASES CITED

STATUTES CITED

ISSUE

1. Is the victim entitled to restitution totaling the full value of the vehicle given the previous damage that was present when the victim purchased the vehicle?

   The trial court answered yes.

ARGUMENT

I. Circuit Court ordered an improper amount of restitution in the amount of the full value of the vehicle when the vehicle's taillight was the only "real" damage caused by the defendant.

The Respondent indicates in their brief that the Appellant's brief very narrowly interprets the restitution statute and notably misses key passages of Wis. Stat. §973.20. Wis. Stat. 973.20(2) (the subsection that applies to this matter) provides as follows:

"If a crime considered at sentencing resulted in damage to or loss or destruction of property, the restitution order may require that the defendant:

(a) Return the property to the owner or owner's designee; or

(b) If return of the property under par. (a) is impossible, impractical or inadequate, pay the owner or owner's designee the reasonable repair or replacement cost or the greater of:
1. The value of the property on the date of its damage, loss or destruction; or
2. The value of the property on the date of sentencing, less the value of any part of the property returned, as of the date of its return. The value of retail merchandise shall be its retail value."

As stated in our initial brief, the property has always been in the possession of Ms. Anderson. Therefore, the question is whether (b) applies and what does reasonable repair or replacement cost mean. There is no dispute that the taillight and assembly were damaged. There is no dispute that the estimate provided by Ms. Anderson indicates that the damage and labor would total $160.00. There is further no dispute that the defendant is responsible for the cost to repair the taillight and assembly in the amount of $160.00.

The real issue presented is whether the defendant is required to compensate Ms. Anderson for any additional damage caused to the fender when the fender was substantially damaged prior to the criminal case of the defendant.

The Respondent notes several times in their brief that the Court found the testimony of the victim and her father more credible than the testimony of the defendant's wife. This was also noted in the initial brief filed by the Appellant. However, the Respondent does not indicate in their brief that the Court failed to give any articulate reason to impose $1,200.00 in restitution other than the testimony of the victim and her father being more credible than the testimony of the defendant's wife.

The Respondent indicates that the defendant's wife had limited interactions with the victim's car and has not closely inspected the damage while the victim's father has closely inspected the car after purchasing it. This statement is inappropriate as the father of the victim acknowledges the preexisting damage in his testimony and the fact that there was damage present. Therefore, the preexisting damage is not a question. It is undisputed that there was a baseball size hole and crack in the fender at the time the defendant purchased the vehicle.

The Respondent further fails to mention that the victim did not notice any damage to her vehicle (other than the taillight and assembly) until a week or two after the incident. In fact, she tells law enforcement on the night of the incident that the only damage caused to her car was the taillight and assembly. After two or three weeks, the victim noticed a lower crack that was new and that the original hole appeared to be a different shape, and an upper crack (previously there, but was now longer). Furthermore, the restitution hearing was held nearly eight months after this incident occurred and the victim indicates that she still had not gotten the vehicle fixed. This shows that her ability to drive the vehicle was not affected whatsoever.

Furthermore, not mentioned by the Respondent is that the victim's father acknowledged in his testimony that the preexisting damage would have had to have been fixed in the same way that it would have been after any damage to the fender done by the defendant (if any). He indicated that it was his intention to fix the preexisting hole, but he hadn't done anything to fix it yet. Therefore, he did contemplate fixing this damage prior to any further damage. He agreed that if the vehicle was going to be fixed from its preexisting condition, it would need a new fender or somebody that worked in fiberglass to fix it.

On cross-examination of Troy Anderson (father of victim), defense counsel asked:

Q: So, you were going to have to change the whole area where the hole was anyway, correct?

A: If the vehicle was going to be fixed, it would need a new fender or someone that worked in fiberglass to fix it.

THE COURT: Wait a minute. Sir, are you talking about originally or after the damage by the defendant?

Witness: Well, either time.

THE COURT: Okay.

Witness: Either time. It would have to be done by somebody who worked with fiber—I think it's fiberglass, in my opinion. It might be plastic, I'm not sure.

The Respondent cites Wis. Stat. 973.20(14)(a) in their brief. Wis. Stat. 973.20(14)(a) provides that:

"The burden of demonstrating by the preponderance of the evidence the **amount of loss sustained by a victim as a result of a crime** considered at sentencing is on the victim."

Here, the amount of loss sustained by the victim is clearly $160.00 as provided by the estimate that was presented in court at the restitution hearing. As previously stated, this is undisputed. The victim did not suffer a loss of anything above $160.00 as there was already previous damage on the vehicle which would have had to have been fixed despite any further damage.

By statute, the victim carries the burden of proving the amount of loss sustained as a result of the crime by a preponderance of the evidence. Wis. Stat. § 973.20(14)(a). *State v. Madlock,* 230 Wis.2d 324, 336, 602 N.W.2d 104, 110 (Ct. App. 1999). Here, it is apparent that the victim has proved that the loss sustained equals $160.00, but has not proved that the loss sustained is the full value of the car. It would be impractical for the victim to be able to prove that the total loss sustained is the full value of the car as the car was already substantially damaged before the defendant's criminal actions.

The Respondent's brief cites case law to support their position. The Respondent cites *State v. Canady,* 2000 WI App 87, 234 Wis.2d 261, 610 N.W.2d 147, *State v. Rash,* 2003 WI App 32, 260 Wis.2d 369, 659 N.W.2d 189, and *State v. Madlock,* 230 Wis.2d 324, 336, 602 N.W.2d 104, 110 (Ct. App. 1999).

State v. Canady discusses a defendant's criminal actions that resulted in a police officer grabbing a pry bar in defendant's pocket, tossing it aside, and cracking a

glass door pane. The defendant was required to pay restitution for that cracked door. Requiring the defendant to pay the full value of a vehicle that was already damaged before the criminal conduct is distinguishable from a defendant being required to pay for a cracked door. In *Canady,* the police officer was attempting to detain the defendant and cracked the glass door pane while doing so. Therefore, it is obvious that the damage was a **direct** result of the defendant's criminal conduct of resisting arrest and therefore, the defendant should be required to pay restitution in the amount of the door. Here, in the present case, it is not so direct.

The purpose of restitution in this matter would be to restore the vehicle to the condition it was at before the incident occurred. This would still be a damaged vehicle. In *Canady,* it would be to restore the door to the condition it was before the incident and the door was not cracked before the incident occurred. Therefore, the two cases are quite distinguishable despite what the Respondent indicates.

State v. Rash discusses when a defendant was found liable for damages to an unlocked car by a third-party because the defendant kidnapped the car owner.

Here, in the present case, the defendant directly caused damage to a car totaling $160.00. In *Rash,* the car was left unlocked because Rash kidnapped the car owner. If Rash would not have kidnapped the car owner, the car would not have been left unattended and unlocked and therefore, no damages would have resulted. If the defendant in the present case would not have caused the damage to the taillight and assembly, the preexisting damage would still be there and the victim would still have to fix the vehicle. Therefore, the facts in these two cases are also quite distinguishable.

The respondent's brief indicates that *State v. Madlock* states "an offender cannot escape responsibility for restitution simply because his or her conduct did not directly cause the damage." Here, this statement seems to be relating to a case like *Canady* where the defendant's conduct didn't **directly** cause the cracked door, but was a direct result of the defendant resisting arrest, a crime. The cracked door would not have happened if the defendant was not committing a crime. Again, in the present case, even if the defendant would not have caused the undisputed damages, the previous damage would still be present and the victim would still have to fix the car in the same manner she does now.

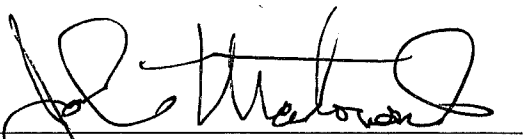
CONCLUSION

Therefore, the Court abused its discretion in ordering restitution for the full value of the vehicle when there was preexisting damage. There is no logical basis to

require the defendant to pay for the replacement of the fender which was in need of replacement at the time of the purchase of the vehicle.

For the reasons set forth above, the defendant-appellant respectfully requests this Court to reverse the restitution order requiring the defendant to pay $1,200.00 to Sydney Anderson. The defendant-appellant further asks this Court for an order determining restitution in the amount of $160.00 plus the 10% restitution surcharge.

Dated this 27 day of June, 2016.



John Matousek
Attorney for Defendant-Appellant
State Bar No.: 1009195

FORM AND LENGTH CERTIFICATION §809.19(8)(d))

I hereby certify that this brief conforms to the rules contained in s.809.19(8)(b) and (c) for a brief produced with a proportional font. The length of this brief is six pages and 1,692 words.

Signed:

John Matousek, Attorney for Appellant
State Bar No.: 1009195

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.

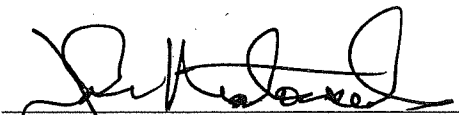
A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed:

John Matousek, Attorney for Appellant
State Bar No.: 1009195

CERTIFICATION OF MAILING

I certify that this brief was deposited in the United States Mail for delivery to the Clerk of Court of Appeals by first-class mail, or other class of mail that is at least expeditious, on June 28, 2016.

Signed: 

John Matousek, Attorney for Appellant
State Bar No.: 1009195