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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2016AP000937 CR

ROY MITCHELL,

Defendant-Appellant.

Appeal from the Circuit Court for Dane County
The Honorable David T. Flanagan, Presiding
Circuit Court Case No. 15CF1123

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

- 1) Did the circuit court err when it ordered restitution for medical bills sustained as a result of an altercation when all charges relating to the altercation were dismissed?

The trial court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant believes that the Court can decide the issues based on the briefs, but welcomes the opportunity for oral argument if the Court has questions not resolved by the briefs. Publication is not warranted pursuant to Wis. Stat. § 809.23.

STATEMENT OF THE FACTS

On June 2, 2015, the State filed a complaint alleging that on May 23, 2015, the defendant, Lisa (Roy) Mitchell,¹ committed: (1) Felony Strangulation and Suffocation, in violation of Wis. Stat. § 940.235(1); (2) Misdemeanor Battery, in violation of Wis. Stat. § 940.19(1); Misdemeanor Theft in violation of Wis. Stat. § 943.20(1)(a); and (4) Misdemeanor Obstructing an Officer in violation of Wis. Stat. § 946.41(1), all charged as repeaters. (R2; A.App. 101).

A preliminary hearing was held on July 21, 2015 (R35; A.App. 119). At the preliminary hearing, the officer investigating the case testified to the events as they were reported to him by the alleged victim. (R35). Although not called as a witness, Ms. Mitchell offered her version of events as well. (R35:16-18; A. App. 120-21). In summary, Ms. Mitchell explained to the court that the alleged victim, JC, wanted to buy sex from her and then refused to pay. (R35:16;

¹ The defendant is transgendered and identifies as female. Court documents and the State refer to her using male pronouns. Undersigned counsel will use female pronouns in this brief and any other documents submitted to the Court.

A.App.120). CL got aggressive with her, beat her up and she fought back. (R35:17; A.App. 121). Notwithstanding her statement, the court found probable cause to bind her over for trial and State filed an Information with the same counts alleged in the complaint, with the exception that count 3 was changed from Misdemeanor Theft to Felony Theft from a Person in violation of Wis. Stat. § 943.20(1)(a). (R9).

On November 23, 2015, the State filed an Amended Information adding count 5, Misdemeanor Theft in violation of Wis. Stat. § 943.20 and count 6, Prostitution (misdemeanor) in violation of Wis. Stat. § 944.30(1m)(a). (R18). On the same day, Ms. Mitchel plead to counts 4, 5 and 6 and counts 1, 2 and 3 were dismissed. (R19). Explaining the deal, the deputy district attorney stated:

I believe we have the matter resolved. There's been a substantial amount of follow up investigation, which shed new light on the facts and circumstances here, as a result of which we have tendered an Amended Information to the court.

Specifically, the state is agreeing to dismiss the charge of strangulation, misdemeanor battery, and I believe the felony theft charge, which would be counts 1, 2, 3 in the current information, in exchange for which the defendant will withdraw his plea of not guilty and enter a plea of guilty to obstructing as a repeater.

Additionally, the state has added two other charges reflective of the circumstances herein, and that is that a count of misdemeanor theft, because some money that exchanged hands here not voluntarily, and we have added a charge of solicitation of prostitution count....

(R36:2-3; A.App.122-23).

The court found a factual basis for the pleas based on Ms. Mitchell's statements that the allegations contained in counts 4, 5, and 6 of the Amended Information were true. (R36:9). The court sentenced Ms. Mitchell to nine months in the Dane County Jail on each of the three misdemeanor

counts that she plead to, all counts concurrent to one another and ordered Ms. Mitchell to pay court costs. (R36:11-12; R21; A.App. 105). The circuit court made no mention of restitution, nor was it written in the plea waiver or questionnaire. (R36).

On December 3, 2016, the State proposed an order for restitution in the amount of \$12,683.43, including \$11,059.43 in medical bills paid out for JC's injuries by Crime Victim Compensation. (R22; R23). On December 7, 2015, counsel for the defendant sent a letter to the court stating that the defendant did not agree with the proposed order. (R24; A.App. 109-18). The defense argued that as a result of the plea agreement in which the strangulation, battery and theft of a person charges were dismissed, the "crimes considered at sentencing" did not result in 'bodily injury' to the victim." Wis. Stat. § 973.20(1g)(3)." (R24:1; A.App. 109). The defense further argued that that the dismissed charges were not "read-in." (R24:2; A.App. 109). The defense conceded that Ms. Mitchell owed restitution in the amount of \$393. (R24:2; A.App. 110).

On December 10, 2015, Ms. Mitchell sent a follow-up letter to the court, reiterating that she did not agree with the proposed restitution order. (R25:1-2; A.App. 111-2). She attached email correspondence between her attorney and the district attorney's office, including a statement made by the deputy district attorney that "the follow-up investigation has confirmed [Ms. Mitchell's] version of events." (R25:6; A. App. 116).

The court scheduled a hearing for January 15, 2016, however, Ms. Mitchell was unable to attend due to illness. (R37:2). Counsel for the parties laid out their positions, with defense counsel reiterating that the dismissed charges were a result of self-defense and not any of the crime for which she was convicted. (R37) The parties agreed to set over the restitution hearing, with a stipulation that Crime Victim Compensation did in fact pay out monies to the alleged victim in the amount claimed and that the defendant did owe the victim \$393 in restitution. (R37:8, 12-14). The parties

agreed that issue of whether the medical bills were subject to restitution was a legal issue. (R37:13-14).

The set-over restitution hearing occurred on March 15, 2016. (R38; A.App. 127). The alleged victim did not come to the hearing and no other evidence was presented. (R38; A.App. 127). After hearing argument by the parties, the judge ordered restitution in the amount \$393 for property damage and \$11,059.43 in medical bills. (R38:10; A.App. 138; R30; A.App. 107).

Ms. Mitchell wrote the court requesting a modification of the restitution order and the court denied the request. (R31; R32). This appeal follows.

ARGUMENT: The circuit court erred when it ordered Ms. Mitchell to pay the victim's medical bills because they were not related to any crime for which she was convicted.

A restitution order is reviewed under the erroneous exercise of discretion. *State v. Haase*, 2006 WI App 86, ¶5, 293 Wis. 2d 322, 716 N.W.2d 526. A trial court erroneously exercises its discretion when its decision is based on an error of law. *Id.* Whether the trial court is authorized to order restitution pursuant to Wis. Stat. § 973.20 under a certain set of facts presents a question of law that is reviewed de novo. *Id.*

A. The Law on Restitution

Wis. Stat. § 973.20 authorizes the trial court to order restitution. Section 973.20(1r) provides that the court “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.” The phrase “[c]rime considered at sentencing” is defined as “any crime for which the defendant was convicted and any read-in crime.” Wis. Stat. § 973.20(1g)(a).

1. The claimant must be a victim of the crime(s) considered at sentencing.

Consistent with this statutory language, case law illustrates that restitution is unlawful when the claimant was not a victim of a crime considered at sentencing. This is true even in instances when the claimant was present and suffered losses as a result of the criminal activity. For example, in *State v. Lee*, 2008 WI App 185, ¶¶2-5, 5314 Wis. 2d 764, 762 N.W.2d 431, an officer was injured while pursuing a person eventually convicted of armed robbery. The defendant was not convicted of fleeing an officer, assaulting an officer, or any crime related to his flight from the officer. *Id.*, ¶4. Accordingly, the officer was not a victim of a crime considered at sentencing, and neither he nor the insurance company that paid expenses related to his injuries could receive restitution. *Id.* In another example, *State v. Schmaling*, 198 Wis.2d 756, 758-62, 543 N.W.2d 555 (Ct.App.1995), the defendant was charged with seven felonies for causing an accident that led a semitrailer to burst into flames on the highway. *Id.* The defendant plead to second-degree reckless homicide and second-degree recklessly endangering safety. *Id.* Restitution was denied for county for firefighting costs because the county was not a victim of second-degree reckless homicide and second-degree recklessly endangering safety. *Id.* The law is clear that only the victim of a crime considered at sentencing can claim restitution.

2. There must be a causal connection between the crime(s) considered at sentencing and the disputed damage.

Before a trial court may order restitution, a causal nexus must be established between the crime considered at sentencing and the disputed damage. *State v. Canady*, 234 Wis. 2d 261, 610 N.W.2d 147 (Wis. App. 2000). A causal link for restitution is established when the defendant's criminal acts set into motion that resulted in the damage. *Id.* There must be a showing that the defendant's criminal activity was a substantial factor in causing the pecuniary injury to the victim in a "but for" sense. *State v. Johnson*, 2005 WI App 201, 287 Wis. 2d 381, 704 N.W. 2d 625. "Substantial factor" denotes that the defendant's conduct has

such an effect in producing the harm as to lead the trier of fact to regard it as a cause, using that word in the popular sense. *Id.*

This principal is illustrated in *State v. Rash*, 2003 WI App 32, 260 Wis. 2d 369, 659 N.W.2d 189. In this case, the defendant was convicted of armed robbery. *Id.*, ¶2. The victim in this case was abducted, at gun point, just after he had unlocked his car. *Id.* The defendant drove off with the victim and robbed him, leaving the victim's car unlocked. *Id.* The unlocked car was then stolen by someone other than the defendant, who damaged it and stole property from within it. *Id.* The defendant was liable for restitution for the damage to the car and the lost property even though he had not directly caused the damage because but for the defendant's crime, the damage and property loss would not have occurred. *Id.*, ¶8.

B. Under Wisconsin law, the restitution order for JC's medical bills is unlawful.

Under the plain language of the statute, restitution in this case can only be ordered for crimes considered at sentencing — the misdemeanor theft, the obstruction and the prostitution. There is no possible argument that JC was a victim of the obstruction, a crime against government and its administration, or the prostitution, a crime against sexual morality. Thus, they are not an appropriate basis for a restitution order. The only crime that could form a basis for the restitution in this case is the misdemeanor theft.

Physical injury is not a natural consequence of misdemeanor theft. The record shows all criminal allegations regarding physical injury or contact were dismissed after a follow-up investigation showed that they were unfounded. The altercation that led to the injuries occurred around the same time as the theft, but temporal connection does not amount to the required causal nexus. The fact that it was determined that Ms. Mitchell was not criminally liable for the injuries sustained by JC eviscerates any argument that the theft could have somehow caused the injuries. There is

nothing in the record that suggests in any way that the physical injuries were caused by the theft.

CONCLUSION

Ms. Mitchell was ordered to pay restitution for injuries that were not related to any crime for which she was convicted. Accordingly, the order for restitution was unlawful.

Therefore, for the above stated reasons, the Defendant respectfully requests that this Court vacate the circuit court's order for restitution as it applies to JC's medical expenses.

Dated this _____ day of September, 2016.

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 6064 words.

Dated this ____ day of July, 2016.

Signed:

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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 § 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 ____ day of July, 2016.

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