

RECEIVED

01-12-2017

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2016AP937-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROY A MITCHELL JR,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 12, THE HONORABLE DAVID T. FLANAGAN, PRESIDING

Matthew D. Moeser
Deputy District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1034198

215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT ON PUBLICATION AND ORAL ARGUMENT . . .	iii
STATEMENT OF THE ISSUE	iii
STATEMENT OF RELEVANT FACTS.	1
ARGUMENT	4
CONCLUSION	8
CERTIFICATION	10
CERTIFICATE OF COMPLIANCE.	11

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>PAGE(S)</u>
<i>State v. Canady</i> , 2000 WI App 87, ¶8, 234 Wis.2d 261, 610 N.W.2d 147. . .	.6,7
<i>State v. Hoseman</i> , 2011 WI App 88, ¶ 16, 334 Wis.2d 415, 799 N.W.2d 479. . .	.5,7
<i>State v. Madlock</i> , 230 Wis.2d 324, 329, 602 N.W.2d 104 . . . . .	.4
<i>State v. Rash</i> , 2003 WI App 32, ¶5, 260 Wis.2d 369, 659 N.W.2d 189. . .	.4,6,7
 <u>STATUTES CITED</u>	
§§ 939.62(1)(a) . . . . .	.1
§§ 939.62(1)(b) . . . . .	.1,2
§§ 940.19(1) . . . . .	.1
§§ 940.235(1) . . . . .	.1
§§ 943.20(1)(a) . . . . .	.2
§§ 944.30(1m)(a) . . . . .	.2
§§ 946.41(1) . . . . .	.1
§§ 973.20 . . . . .	.4,5,8
§§ 973.20(5)(d) . . . . .	.5
§§ 973.20(1r), (1g)(a) . . . . .	.6

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State of Wisconsin does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

STATEMENT OF THE ISSUE

Did the Circuit Court err when it ordered restitution in this case?

Circuit Court Answer: No.

STATEMENT OF RELEVANT FACTS

On June 2, 2015, Plaintiff-Respondent State of Wisconsin ("State") filed a Criminal Complaint in Dane County Circuit Court charging Defendant-Appellant Roy A. Mitchell ("Mitchell") with four criminal offenses, to-wit: Strangulation and Suffocation as a Habitual Criminal contrary to Wis. Stat. §§ 940.235(1) and 939.62(1)(b); Battery as a Habitual Criminal contrary to Wis. Stat. §§ 940.19(1) and 939.62(1)(a); Theft as a Habitual Criminal contrary to Wis. Stat. §§ 943.20(1)(a) and (3)(a), and 939.62(1)(a); and Obstructing an Officer as a Habitual Criminal contrary to Wis. Stat. §§ 946.41(1) and 939.62(1)(a). (R2:1-2).

As outlined in the Criminal Complaint, each of these offenses grew out of an incident between Mitchell and a person identified for purposes of this brief as JC. (R2:2) JC indicated that he intended to give Mitchell \$5 but that Mitchell grabbed JC's wallet and removed approximately \$500 in U.S. Currency. JC chased Mitchell and caught up to Mitchell, at which point he grabbed Mitchell. Mitchell then picked up a stick and began to strike JC and then strangled JC. The Obstructing charge emanated from

Mitchell lying to a police officer about Mitchell's name.
R2:3).

On July 21, 2015, following a preliminary examination, the State filed an Information that altered Count Two, Theft as a Habitual Criminal, to a charge of Theft from Person as a Habitual Criminal contrary Wis. Stat. §§ 943.20(1)(a) and (3)(e), and 939.62(1)(b). (R9:2).

On November 23, 2015, the State filed an amended information that added Count 5 - Theft as a Habitual Criminal contrary to Wis. Stat. §§ 943.20(1)(a) and (3)(a), and 939.62(1)(a) - and Count 6 - Prostitution - Nonmarital Sexual Intercourse as a Habitual Criminal contrary to Wis. Stat. §§ 944.30(1m)(a) and 939.62(1)(a). Mitchell pled guilty to these charges as well as count 3 - Obstructing an Officer as a Habitual Criminal. As part of a plea agreement, the State moved to dismiss the other counts and Judge David T. Flanagan sentenced the defendant to nine months' in the county jail on each of the three crimes of conviction.¹

¹Judge Flanagan presided over the plea and sentencing as well as the restitution hearings. Judge Flanagan retired in July 2016 and Governor Scott Walker appointed Judge Clayton Kowski to replace Judge Flanagan.

On December 7, 2015, the State submitted a proposed restitution order to Judge Flanagan seeking restitution for property losses suffered by JC and to recoup payments for medical bills made on JC's behalf by the Crime Victim Compensation Program. See Wis. Stat. Chapter 949, Subchapter I. (R23). Mitchell and his attorney objected. (R24, 25). Judge Flanagan held a restitution hearing on January 15, 2016. At that hearing, the State informed Judge Flanagan that both JC and representatives of the Crime Victim Compensation Program were present. (R37:3-5). Judge Flanagan indicated that the more serious question - as compared to the amounts of any category of damage - was whether he could order restitution based on the crimes considered at sentencing. (R37:4-5, 9-10). The parties discussed that there was no dispute what Crime Victim Compensation has paid out for medical bills incurred by JC but that losses of property, beyond \$393 dollars, by JC was still in dispute. (R37: 9-14).

JC did not appear at the next restitution hearing held on March 15, 2015. Following argument by the parties, Judge Flanagan held that JC could only recover \$393 of lost property but that Crime Victim Compensation was entitled to restitution for medical bills, "It's sufficiently related

to the course of conduct that lead [sic] to the arrest and lead [sic] to the convictions that it's a close call." (R38:10). Following this hearing, the State submitted, and Judge Flanagan signed, an order for restitution awarding JC \$393 and Crime Victim Compensation \$11,059.43 (R30).

ARGUMENT

Judge Flanagan Properly Exercised his Discretion in Awarding Restitution.

1. Standard of Review.

A request for restitution, including the calculation as to the appropriate amount of restitution, is addressed to the circuit court's discretion and its decision will only be disturbed when there has been an erroneous exercise of that discretion. *See State v. Madlock*, 230 Wis.2d 324, 329, 602 N.W.2d 104 (Ct.App.1999). A circuit court's "assessment of restitution is within its discretion; whether a restitution order comports with the [restitution] statute however, is subject to our *de novo* review." *State v. Rash*, 2003 WI App 32, ¶5, 260 Wis.2d 369, 659 N.W.2d 189 (emphasis in original). Restitution is governed by Wis. Stat. § 973.20 and directs that circuit courts "shall order the defendant to make full or partial restitution ... to any victim of a crime considered at sentencing," with crime

considered at sentencing further defined as "any crime for which the defendant was convicted and any read-in crime." Wis. Stat. §§ 973.20(1r), (1g)(a). Wis. Stat. § 973.20(5)(d) allows a court to order reimbursement to a person who has compensated a victim or a loss "otherwise compensable under this section."

2. Judge Flanagan Correctly Found That There was a Casual Nexus Between Mitchell's Conduct and JC's Losses.

The State construes Mitchell's challenge to Judge Flanagan's order as whether Judge Flanagan had the legal authority to order restitution related to JC's medical bills. Wisconsin courts employ a two factor test to determine if they have the authority to order restitution. First, the person for whom restitution is sought must be entitled to it. See *State v. Hoseman*, 2011 WI App 88, ¶ 16, 334 Wis.2d 415, 799 N.W.2d 479. Second, there must be a causal nexus between the defendant's conduct and the harm suffered by the victim to which the restitution is addressed. See *id.* The primary purpose of the restitution statute is to compensate victims and courts therefore construe Wis. Stat. § 973.20 "broadly and liberally in order to allow victims to recover their losses as a result

of a defendant's criminal conduct." *State v. Canady*, 2000 WI App 87, ¶8, 234 Wis.2d 261, 610 N.W.2d 147.

Wisconsin law does not require that a specific element of a crime considered at sentencing result in the loss to a victim. Instead, Wisconsin courts have taken a more global view of how criminal conduct results in losses to a victim. In *Rash*, the defendant and other co-criminals abducted the victim who had just unlocked his car. A person who had no apparent connection to Rash or his co-criminals stole the car, damaged the car, and stole the victim's possessions that were in the car. See *Rash*, 2003 WI App 32, ¶¶2-3. This Court upheld the circuit court's restitution order because it concluded that the defendant's actions - abducting the victim - left the car vulnerable to theft and damage, which were clear consequences of what Rash had done. See *id.*, ¶¶ 3, 8. The *Rash* court held that a defendant's conduct was a substantial factor in causing a victim's losses when "the defendant's criminal act set into motion events that resulted in damage or injury." *Id.*, ¶7.

In *Canady*, a police officer arrested the defendant as a suspected burglar and, in the course of the arrest, pulled a pry bar out of the defendant's jacket and threw it out of reach, resulting in a cracked glass door. See

Canady, 2000 WI App 87, ¶ 2. Even though the officer's actions were the immediate or direct cause of a victim's damage, this Court still held that the defendant was obligated to pay restitution for the door because his "criminal actions were not too remote to constitute a substantial factor in causing the property damage." *Id.*, ¶ 12.

In *Hoseman*, a defendant who had rendered an 1885 Victorian home uninhabitable as a result a marijuana growing operation was required to pay restitution, even though his only conviction was for conspiracy to manufacture tetrahydrocannabinols through a marijuana growing operation. See *Hoseman*, 2011 WI App 88, ¶¶1-3. This Court rejected *Hoseman's* argument that his crime was "victimless." See *id.*, ¶¶ 23-24. This Court also concluded that *Hoseman's* conduct was a substantial factor in causing the victims' damages. See *id.*, ¶ 26.

Collectively, *Rash*, *Canady*, and *Hoseman* support Judge Flanagan's exercise of discretion in this case. Those cases establish that a court need not tether restitution to a specific element of a crime considered at sentencing, that a court does not need to determine whether a defendant should have foreseen a victim's losses, and that even a

"victimless crime" may result in victim's who suffer losses that are subject to compensation under Wis. Stat. § 973.20.

Mitchell's criminal conduct in stealing from JC, likely in the aftermath of a solicitation for prostitution, was a substantial factor in causing JC's losses, including those compensated by the Crime Victim Compensation program. JC's injuries resulted from him confronting Mitchell after the theft and attempting to secure the return of his property.² There is no requirement that JC's injuries be foreseeable by Mitchell. Nor does it matter that Mitchell was not convicted of a crime of violence nor that no such crime was read in. Wisconsin law allows courts to take a retrospective view of episodes of criminal conduct and use hindsight to determine if they should order restitution. That is what Judge Flanagan did in this case and his exercise of discretion was well within the boundaries of his authority.

CONCLUSION

Upon the record in this matter, and for the reasons stated above, the State respectfully requests this Court to affirm the circuit court's decision.

²The State does not contend that the Obstructing charge bears any causal nexus to JC's losses.

/S/ Matthew D. Moeser

Matthew D. Moeser
Deputy District Attorney
Dane County, Wisconsin
Attorney for Plaintiff-Respondent
State Bar No. 1034198
215 South Hamilton Street
Dane County Courthouse, Room 3000
Madison, WI 53703
Telephone: (608)266-4211

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 10 characters
per inch; double spaced; 1.5
inch margin on left side and 1
inch margins on the other 3
sides. The length of this brief
is _____ pages.

Dated: _____December 30th, 2016_____.

Signed,

/S/ Matthew D. Moeser

Attorney

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 30th day of December, 2016.

/S/ Matthew D. Moeser

Matthew D. Moeser
Deputy District Attorney
Dane County, Wisconsin