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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

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT: There is no causal nexus between the crimes for which Ms. Mitchell was convicted and the restitution ordered by the court.

The law is clear that there must be a causal nexus between the crime for which the defendant is convicted and the disputed damage. A concise statement of the law governing restitution orders and how it should be applied is found in *State v. Rash*:

Before restitution can be ordered under WIS. STAT. § 973.20(2) there must be “a causal nexus” between the crime considered at sentencing and the damage. In proving causation, a victim must show that the defendant’s criminal activity was a “substantial factor” in causing damage. The defendant’s actions must be the “precipitating cause of the injury” and the harm must have resulted from “the natural consequence[s] of the actions.”

...

... [T]he requisite “precipitating cause” [does] not mean that the defendant must have caused directly or even “intended or expected” the damage encompassed by the restitution order; it is sufficient if the defendant’s “actions were a substantial factor” in causing the damage in a “but for” sense. Thus, “precipitating cause” merely means that the defendant’s criminal act set into motion events that resulted in the damage or injury. The phrase “substantial factor” denotes that the defendant’s conduct has such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense.

State v. Rash, 2003 WI App 32, ¶¶6, 8, 260 Wis. 2d 369, 659 N.W.2d 189 (citations omitted).

The State's brief has failed to establish that JC's medical bills were causally related to any of the crimes for which Ms. Mitchell was convicted. The four cases that the State cites in support of its argument, *State v. Rash*, 2003 WI App 32, *State v. Hoseman*, 2011 WI App 88, 234 Wis. 2d 415, 799 N.W.2d 479, *State v. Canady*, 2000 WI App 87, 234 Wis. 2d 261, 610 N.W.2d 147, and *State v. Madlock*, 230 Wis. 2d 324, 602 N.W.2d 104 (Ct. App.1999) involve materially different fact sets and none of them explain how the restitution order is appropriate in this case. If anything, each of these cases underscores that the restitution requested is inappropriate in this case.

A. The cases cited by the State do not support the assertion that there is a causal nexus between Ms. Mitchell's crimes and the damages claimed by JC.

Rash, *Canady* and *Hoseman* are all examples of the court of appeals upholding restitution orders because the defendant's criminal conduct was a substantial factor in the damage sustained by the victim. Unlike the instant case, *Canady* and *Rash* involve situations where a third party actually caused the claimed damage, not the defendant, yet even in these cases the restitution order is upheld because the causal nexus is still very clear. The *Madlock* court, on the other hand, vacated the restitution order because a causal nexus was not established.

In *Rash*, 2003 WI App 32, the victim to whom Rash owed restitution was walking towards his car when Rash abducted him. *Id.*, ¶2. Right before he was abducted, the victim unlocked his car with a remote key and it was that moment that the victim was abducted. *Id.* The court of appeals held that it was reasonable to conclude that there would not have been damage or loss to the victim's car if Rash had not unlawfully abducted the victim. *Id.*, ¶8. Under the law, this makes sense. Had Rash not abducted the victim right after he had unlocked the car, the victim would have

gotten into his car and driven it away. The car would not have been left abandoned and unlocked, substantially increasing its vulnerability to theft. It is therefore reasonable to conclude, as the court of appeals did, but for the abduction, the loss would not have occurred. *Id.*

Similarly, in *Canady*, 2000 WI App 87, the defendant's criminal acts precipitated the damage though he did not directly cause the damage. In this case, the defendant was convicted of several crimes related to a burglary including the crime of resisting arrest. *Id.*, ¶3. Police responded to a complaint regarding a suspected burglary. *Id.*, ¶2. They observed Canady on the premises and attempted to arrest and handcuff him. *Id.* Canady resisted. *Id.* The officer "escorted him to the ground" and in doing so discovered that Canady had a pry bar in the inside pocket of his jacket. *Id.* Fearing that Canady was attempting to grab the pry bar and use it as a weapon, the officer pulled the pry bar out and tossed it out of his reach. *Id.* The tossed pry bar hit a door and damaged it. *Id.*, ¶4. Canady argued that he did not cause the damage, the officer did, and he should therefore not be liable for the damaged door. *Id.*, ¶1. The court held that Canady's criminal behavior in resisting the arrest was a substantial factor in causing the property damage. *Id.*, ¶1. This analysis also makes sense. Had Canady not committed the crime of resisting, the officer would not have had to physically "escort" him to the ground and expediently disarm him. The damage would not have occurred, but for Canady's criminal act of resisting.

In *Hoseman*, 2011 WI App 88, the defendant was convicted of conspiracy to manufacture marijuana. *Id.*, ¶2. Hoseman had had a sophisticated grow operation in a rental property that was rendered uninhabitable as a result of the grow operation. *Id.*, ¶¶1-2. The court of appeals upheld a restitution order to pay the landlord for the damages to the rental property. *Id.*, ¶28. The court of appeals rejected Hoseman's argument that conspiracy to grow marijuana is a

victimless crime and therefore his landlords were not victims and could not claim restitution. *Id.*, ¶¶17-24. The court held that the landlords, as owners of the property destroyed by the grow operation, were “direct targets of the conspiracy to manufacture marijuana,” and as such, the court held that they could claim restitution. *Id.* Secondly, citing the significant evidence and testimony of damage to the house as a result of the grow operation, including mildew damage on the walls, fixtures and curtains, ruined wood floors, carpets and antique rugs, TCH saturated surfaces, the court of appeals easily reached the “inescapable conclusions that actions taken in furtherance of the conspiracy to manufacture marijuana caused the damage to the residence.” *Id.*, ¶¶ 7, 26-27.

The court of appeals applied the same analysis of cause in *Madlock*, 230 Wis. 2d 324, however in this case, the court was unable to uphold the restitution order because it could not find the requisite causal nexus under the facts presented. *Id.* at 336. In this case, the defendant was convicted of operating a motor vehicle without the owner’s consent. *Id.* at 325. The car was stolen four to six days before the defendant was found in possession of it and the victim testified that his car had been left unlocked with the keys in it when it was stolen. *Id.* at 327. After conviction, Madlock was ordered to pay the victim’s insurance company \$1603 for losses sustained as a result of his vehicle being stolen. *Id.* at 325, 327. When explaining its decision to vacate the restitution order, the court of appeals noted, “It appears that the [circuit] court believed that because Madlock’s crime involved the vehicle and because the victim was entitled to be made whole, Madlock was *ipso facto* responsible for the restitution.” *Id.* at 334. The court held that the law required more.

The requisite causal link is clearly present in *Rash*, *Canady* and *Hoseman*. The defendant’s crime precipitated and set into motion the events that caused the damage. There was little possibility of intervening acts to challenge the

logical conclusion that the damage would not have happened but for the defendant's crime. The same cannot be said for *Madlock*, however. In this case there was ample opportunity for events unrelated to the defendant's criminal act to cause the victim's loss. As in *Rash*, the victim's car in *Madlock* was vulnerable to theft because it was left unlocked, this time with this keys in it. Unlike in *Rash*, however, the defendant had nothing to do with causing the vulnerability of the victim's car. Anybody could have stolen the car and caused the loss sustained by the victim. This case clearly shows even though Madlock was convicted of a crime against the victim, even though the victim did in fact sustain losses around the same time as this crime and importantly, even though it would have been possible for Madlock himself to have caused the loss, without more evidence, these facts were not enough to establish that required causal link between his crime and the victim's loss.

B. A review of facts in the record does not show the causal nexus required between the crimes considered at sentencing and JC's injuries.

With no cite to the record, the State argues, "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. JC's injuries resulted from him confronting Mitchell after the theft and attempting to secure the return of his property." State's Brief at 8 (emphasis added). These conclusory statements are pure speculation. Nowhere in the record is there any evidence that this is how the misdemeanor theft occurred. Indeed, before the State's assertion in its Response Brief, the record displays absolutely no discussion as to when or how the misdemeanor theft occurred.

The plea hearing provides very little insight into the factual circumstances surrounding the crimes Ms. Mitchell pleaded to. Notably, the facts as alleged in the criminal

complaint were not used as a basis for the plea. Further, the record is clear that the original accusations and charges, as presented in the Criminal Complaint, were not substantiated after the follow-up investigation. (R36:2-3; A.App. 122-23). The court's required inquiry into the factual background pursuant to Wis. Stat. § 971.08(1)(b) consisted of merely asking the defendant if she committed the crimes alleged in counts 4, 5, and 6 of the Amended Information. (R36:8-9). Ms. Mitchell's answer in the affirmative ended any further inquiry by the court. *Id.* Lastly, it is significant that the dismissed charges were not "read-in" under Wis. Stat. § 973.20(1g)(b) clearly establishing that they were not intended to be a basis for restitution.

A review of the entire record provides additional information regarding factual circumstances that resulted in Ms. Mitchell's pleas. *See State v. Thomas*, 2000 WI 13, ¶23, 232 Wis. 2d 714, 605 N.W.2d 836 ("It makes sense for a court to view the record in its totality when a judge's initial inquiry into the factual basis may be satisfied by multiple sources spanning the entirety of the record"); *see also State v. Black*, 2001 WI 31, ¶11, 242 Wis. 2d 126, 624 N.W.2d 363 (in conducting the inquiry into a factual basis for an offense, a court may consider hearsay, the preliminary examination, and other records in the case). However, even considering everything in the record, there is still is no basis to assert that that the theft occurred before the altercation, much less that it had any causal link to JC's injuries. According to Ms. Mitchell's statements made at the preliminary hearing, on the day in question, she and JC walked together down Fish Hatchery Road, Perry Street and Badger Road. (R35:16-17; A. App. 122-23). Ms. Mitchell then offered to or was asked to perform sexual acts in exchange for money, specifically \$20, and after she performed the sex acts, JC refused to pay her. *Id.* An altercation ensued. *Id.*

Ms. Mitchell did not explain the details of how the altercation began or who threw the first punch, however, her

lawyer represented to the court that she acted in self-defense. (R37:5). It is clear from the record Ms. Mitchell adamantly denied the battery and strangulation charge and that that after “a substantial amount of follow-up investigation,” the felony strangulation and misdemeanor battery charges were dropped. (R36:2-3; A. App. 124-25; R35:16-17; A. App. 122-23). The only logical inference from these facts is that Ms. Mitchell’s assertion that she acted in self-defense was found to be credible by both the investigating police as well as the district attorney prosecuting the case. (*See also* ADA Paul Burnett’s email “the follow-up investigation has confirmed [Ms. Mitchell’s] version of events.” (R25:6; A. App. 166)).

Significantly, the charge of felony theft from a person pursuant to Wis. Stat. § 943.20(1)(a) and (3)(e) was also dismissed and the charge of simple misdemeanor theft pursuant Wis. Stat. § 942.20(1)(a), to which Ms. Mitchell plead, was reinstated. (R36:2-3; A. App. 124-25). The only reasonable inference from this is that the follow-up investigation showed that Ms. Mitchell did not take the money off of JC’s person and that the theft therefore did not occur during the altercation. Perhaps JC dropped his wallet on the walk over to Badger Road and Ms. Mitchell stole from him then. Perhaps JC’s wallet and money were lying on the ground after the altercation and Ms. Mitchell found it and took the money at that time. Perhaps the two knew each other before the prostitution and the theft occurred much earlier in the day. There are many possibilities as to how the theft may have come about; the only thing clear from the record is that on or around Saturday, May 23, 2015, in the City of Madison, Dane County, Wisconsin, Ms. Mitchell did intentionally take and carry away the moveable property of JC without his consent and with the intent to permanently deprive him of his property. (R36:9-10). The record provides no further details as to how Ms. Mitchell came into possession of JC’s \$393.

Indeed, this case is most analogous to *Madlock*, 230 Wis. 2d 324, where the record did not show a nexus between

the crime of conviction and the loss sustained by the victim. Just as in *Madlock*, Ms. Mitchell was convicted of a crime that occurred around the same time that the victim sustained his losses but there is no evidence in the record that connects the crime of conviction with the loss sustained by the JC. An important difference in these cases is that the trial court in *Madlock* did not hold restitution hearing whereas there was one in this case. 230 Wis. 2d at 326. The State simply did not take the opportunity augment the record with additional facts to support its position. As such, we are left with a skeletal record – a record that does not support the conclusion that Ms. Mitchell’s crimes caused JC’s damage.

C. JC was not the victim of prostitution and was not damaged by Ms. Mitchell’s solicitation of prostitution.

To the extent that the State cites *Hoseman* in support of an argument that JC should be considered a victim of Ms. Mitchell’s solicitation of prostitution and therefore has standing to collect restitution, this has no merit. The facts of *Hoseman* clearly showed that the landlords were direct victims of substantial monetary loss that was undeniably caused the defendant’s crime. There is no parallel in the instant case. Notwithstanding the fact that individuals prostituting themselves are often exploited and victims of larger negative societal forces,¹ JC was not a victim; he was a “John” -- someone who pays prostitutes for sex. As such, JC was damaged by his own choices. Ms. Mitchell’s act of offering sex in exchange for money did not set any chain of events into motion. JC could have declined to engage in the illegal act of paying a prostitute for sex; he chose not to. After making the decision to engage her services, JC then he

¹ See e.g. Weitzer, Ronald, “Prostitution Control in America, Rethinking Public Policy,” 32 Crime Law and Social Change 1, 83-102 (1999), available at https://www.researchgate.net/publication/226463602_Prostitution_Control_in_America_Rethinking_Public_Policy (discussing alternatives to prosecuting sex workers).

chose to breach his agreement with her and made the decision not to pay her services. He then also made the decision to beat her up, forcing her to act in self-defense. These were all volitional choices on his part. It is not reasonable to say that Ms. Mitchell's solicitation caused his injuries when he made so many (poor) choices to alter the course of events.

CONCLUSION

The simple question in this case is did Ms. Mitchell's crimes cause JC's injuries and the resulting medical bills. Based on a review of everything in the record, the answer has to be no. The State has conceded that the obstruction charge is not related JC's damages and as discussed above, it is not meritorious to argue that JC is the victim of solicitation of prostitution. The last charge to consider is the misdemeanor theft. There is evidence that the theft did not occur during the altercation yet there is no evidence that the theft occurred before or after the altercation. Even if one speculates that the theft did occur before the altercation, there is still no evidence showing that the theft caused the altercation. Further, even if there were a factual basis on which to believe the theft caused the altercation (which there is not), this theory runs into the problematic fact that the State chose to dismiss Ms. Mitchell's criminal charges relating to the altercation. The State cannot agree to dismiss the charges, represent to the court that they were unfounded and then ask for restitution on the basis for the dismissed charges.

It may be that the State sustained a loss when it paid JC's medical bills before the investigation into the case was complete. It was illegal and unjust to transfer that loss to Ms. Mitchell.

Therefore, for the above reasons, Defendant Lisa (Roy) Mitchell respectfully requests that this Court vacate the trial court's order on restitution.

Dated this _____ day of January, 2017.

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 2997 words.

Dated this ____ day of January 2017

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 January 2017.

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