STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP1610-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID M. LARSON,

Defendant-Appellant.

On a Notice of Appeal from the Restitution Order and An Amended Judgment of Conviction Entered in the Winnebago County Circuit Court, the Honorable Daniel J. Bissett, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ALISHA MCKAY
Assistant State Public Defender
State Bar No. 1090751

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2123
mckaya@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUES PRESENTED

Vehicles driven by David M. Larson and R.A.C. collided within a traffic circle. Larson was later convicted of operating while intoxicated pursuant to a plea agreement and a count of hit and run was dismissed and read in at sentencing. The circuit court ordered Larson to pay $2,521 in restitution to R.A.C. plus the 10% restitution surcharge.

The issue in this case is whether R.A.C. met his burden to show by a preponderance of the evidence that the purported losses were caused by an offense considered at sentencing?

The circuit court answered: yes. (App. 111-121; 44:49-59).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because the briefs will adequately address all relevant issues. Publication is not appropriate because this is a one-judge appeal. *See* Wis. Stat. §§ 752.31(2)(f) and (3) and (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE AND FACTS

Background

On November 27, 2016, vehicles driven by David M. Larson and R.A.C. collided within a traffic circle. (23:5, 10-12). Kyle Schroeder, an off-duty Winnebago County Sheriff's Deputy, witnessed the accident, checked on the drivers, and called in the accident. (23:10-11). Larson and R.A.C. agreed to move to a nearby location to discuss the

accident and Schroeder followed. (*Id.* at 11). Larson drove toward the agreed upon location, but did not meet with R.A.C. as planned. (*Id.*). Schroeder followed Larson and called in his location for on-duty law enforcement to respond. (*Id.* at 13). Larson was subsequently arrested for operating while intoxicated (OWI) and hit and run. (*Id.* at 12-13).

The state originally charged Larson with count one, operating while intoxicated (OWI) as a fourth offense, and count two, hit and run. (3:1). The state later amended the complaint to add count three, operating with a prohibited alcohol concentration (PAC) as a fourth offense, with the alcohol fine enhancer.[1] (8:1-2). Pursuant to a plea agreement, Larson pled no contest to count one, OWI-fourth offense. (42:2). Count two, hit and run, was dismissed and read-in at sentencing and count three, PAC-fourth offense, was dismissed. (*Id.*). At sentencing, the parties jointly recommended a withheld sentence, two years of probation with conditional jail time, a $2,600 fine, and a 33-month license revocation and ignition interlock period. (44:59-60). The court sentenced Larson in accordance with the joint recommendation. (App. 101-107; 44:65-66).[2]

R.A.C., the other driver involved in the accident, requested $3,092.25 in restitution. (16:1; 44:). His amended restitution request included costs for towing, the estimated value of his vehicle, and chiropractic bills. (16:2-5). Larson contested restitution and the court held a hearing prior to sentencing. (44:1-59).

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[1] The amended complaint also added the alcohol fine enhancer to count one. (8:1).

[2] Larson's probation was later revoked and he received a time-served disposition. (App. 108-109; 34:1; 38:1-2).

The Restitution Hearing

At the restitution hearing, R.A.C. testified that he was driving on Washburn Street towards Witzel Avenue as he approached the traffic circle. (44:5). R.A.C. explained that Washburn Street has three lanes and that he was in the outer most right lane, which does not enter the traffic circle to turn right onto Witzel Avenue. (*Id.*). As he made his way from Washburn to Witzel, R.A.C. testified that his vehicle and Larson's vehicle collided. (*Id.*). R.A.C. was adamant that to turn right from Washburn onto Witzel he did not enter the traffic circle because of an on-ramp type set-up, which he described as separate from the traffic circle. (44:6). The state then showed R.A.C. a diagram of the traffic circle created for the accident report, which indicates that traffic on Washburn must enter the traffic circle to proceed onto Witzel to the right. (44:6-7; 23:5). R.A.C. continued to dispute the layout of the traffic circle indicating that he uses this route daily and that his memory of the traffic circle was correct. (44:7-8, 9, 25-26). On cross-examination, when shown a Google satellite image of the traffic circle, R.A.C. agreed that there was no third lane that allowed vehicles to bypass the traffic circle. (*Id.* at 28). He also agreed with defense counsel that he had incorrectly marked the location of the accident on the diagram shown to him during direct examination. (*Id.* at 27).

R.A.C. also testified that a yield sign was posted for vehicles on Washburn Street before the transition onto Witzel Avenue occurs. (44:25-28). He testified that he looked to his left for other vehicles and that he did not see any vehicles in his lane. (*Id.* at 8, 37-39). R.A.C. agreed that as a result of this accident he was cited for failure to yield right-of-way and that he pled to a reduced safety violation citation. (44:25-29; 23:19-21). He also agreed that he had an August 2016

citation for failing to maintain control of a vehicle. (44:29-30; 23:22-24)

Defense counsel admitted exhibit three, without objection, at the restitution hearing, which contained the officer's narrative of the accident. (43:42; 23:7-17). This narrative provides that the off-duty deputy who witnessed the accident, Schroeder, told an investigating officer that he was driving behind R.A.C.'s vehicle on Washburn Street as R.A.C. approached the traffic circle. (23:11). Schroeder reported that R.A.C. appeared to be in a hurry because he failed to slow down much at the yield sign before proceeding from Washburn Street into the traffic circle. (*Id.*). Schroeder indicated that the accident occurred as R.A.C. rolled through the yield sign. (*Id.*). He also reported that when he stopped at the accident scene, both vehicles had their headlights on. (*Id.*).

As a result of the collision, R.A.C. testified and provided documentation indicating that his vehicle sustained an estimated $3,380.90 in damages, but that the vehicle was worth an estimated $1,974. (44:14, 16; 22:1-3; 16:2). As a result, he requested $1,974 for the vehicle damage. (44:16). He also testified, however, that since the accident he had driven the vehicle an additional 1,000 miles or so. (44:24-25). He requested $68.25 in towing costs and testified that his vehicle had to be towed two or three days after the accident, which he attributed to the accident. (44:16-17; 16:4). Finally, R.A.C. requested $1,050 for chiropractic bills, which he testified related to both a pre-existing back problem and for neck pain that developed after the accident. (44:17-21; 16:5).

The state argued R.A.C. was owed restitution in the requested amounts based on "his position that he did nothing

wrong[]" and that "[h]e didn't see any vehicles and was then struck shortly after." (44:43).

Defense counsel's argument focused on whether Larson's or R.A.C.'s conduct caused the accident and asserted that Larson should not be ordered to pay any restitution. (44:44-49). Counsel asserted that R.A.C. failed to yield and was found at fault for the collision. (*Id.* at 44). Defense counsel also relied on the officer narrative from the accident and the off-duty deputy's eyewitness account of R.A.C. appearing to be in a hurry and rolling through the yield sign as the accident occurred. (*Id.* at 47). Counsel also called into question R.A.C.'s credibility due, in part, to his mislabeling of the accident diagram, his inaccurate description of the traffic circle, and his past driving citation. (*Id.* at 48-49).

The court ordered Larson to pay $2,521.00 in restitution to R.A.C. plus the 10% restitution surcharge for a total amount of $2,773.00. (App. 121; 44:59; 28). The restitution ordered included $1,836 for the vehicle and $685 in chiropractic care. (App. 120-121; 44:58-59). The court did not find a sufficient basis connecting the towing costs to the damage caused by the accident. (App. 120-121; 44:58).

In doing so, the court rejected the defense's argument that no causal nexus between Larson's criminal conduct and the purported damages existed, stating:

> But we do have no testimony from the defendant in regards to his observations. We have a statement from the off-duty officer who witnessed at least some of the scene. Although he doesn't give statements in regards to the defendant's vehicle – its speed, its positioning – but he does indicate that he felt that the victim's vehicle did approach the roundabout intersection at a fairly high speed and did not yield to a large degree in this

> particular situation but, again, he didn't testify and there doesn't appear to be statements in regards to the positioning of the defendant's vehicle in this particular situation. The other officers were just accumulating information and did not witness any of the accident so wouldn't be witnesses to the accident in this case. So we really have the victim's statement that he did have look-out, that he did look and did not see any vehicles in the lane. We have case law that says contributory negligence is not a defense in regards to restitution. We have statutory and case law that says the restitution decisions and awards should be liberal and broadly written.

(App. 118-119; 44:56-57).

ARGUMENT

The Circuit Court Erroneously Exercised Its Discretion in Finding That R.A.C. Met His Burden to Show That His Purported Losses Were Caused By a Crime Considered at Sentencing.

A. General legal principles and standard of review.

Restitution in criminal cases is governed by Wis. Stat. § 973.20. The main purpose of the restitution statute "is not to punish the defendant, but to compensate the victim." ***State v. Canady***, 2000 WI App 87, ¶8, 234 Wis. 2d 261, 610 N.W.2d 147. The statute is construed liberally to allow victims to recover their losses. ***State v. Anderson***, 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997). However, the statute itself places limits on the restitution a court may order.

A circuit court is authorized to order restitution to "any victim of a crime considered at sentencing. . . ."

Wis. Stat. § 973.20(1r). The statutory definition of a "crime considered at sentencing" is two-fold. First, it means "any crime for which the defendant was convicted. . .". Wis. Stat. § 973.20(1g)(a).

Second, a "crime considered at sentencing" means "any read-in crime." Wis. Stat. § 973.20(1g)(a). A "read-in" crime is:

> [A]ny crime that is uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing, and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted.

Wis. Stat. § 973.20(1g)(b).

Section 973.20(5)(a) places additional limitations on restitution. It provides:

> (5) In any case, the restitution order may require that the defendant do one or more of the following:
>
> (a) Pay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing.

Special damages pertain to "readily ascertainable pecuniary expenditure attributable to the defendant's criminal conduct that could be recovered in any type of civil action . . .". ***State v. Johnson***, 2005 WI App 201, ¶12, 287 Wis. 2d 381, 704 N.W.2d 625.

Not only is restitution limited to special damages, but before ordering restitution, a court must find a casual nexus

between the crimes considered at sentencing and the requested damages. ***State v. Madlock***, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999). To meet this causation burden, "a victim must show that the defendant's criminal activity was a 'substantial factor' in causing damage." ***Id.*** To meet this "substantial factor" causation requirement "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." ***Johnson***, 287 Wis. 2d 381, ¶13. Put differently, "a causal link for restitution purposes is established when 'the defendant's criminal act set into motion events that resulted in the damage or injury.'" ***State v. Longmire***, 2004 WI App 90, ¶13, 272 Wis. 2d 759, 681 N.W.2d 531. A defendant's entire course of criminal conduct may be taken into consideration in ordering restitution. ***Canady***, 234 Wis. 2d 261, ¶10.

The victim carries the burden of proof under the preponderance of the evidence standard. Wis. Stat. § 973.20(14)(a). Finally, restitution orders are reviewed under the erroneous exercise of discretion standard of review. ***State v. Lee***, 2008 WI App 185, ¶7, 314 Wis. 2d 764, 762 N.W.2d 431. "A trial court 'erroneously exercises its discretion when its decision is based on an error of law.'" ***Id***. (quoted source omitted). "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 [the court] reviews de novo." ***Id***.

B. R.A.C. failed to carry his burden that a causal nexus existed between the crimes considered at the defendant's sentencing and the purported damages; therefore, the restitution order must be vacated.

The circuit court erred as a matter of law in ordering restitution for the purported damages to R.A.C.'s vehicle and for a portion of his chiropractic treatment. Specifically, R.A.C. failed to carry his burden to establish the required causal nexus between the crimes considered at sentencing and the purported damages. In sum, there was no evidence presented that Larson's actions were a substantial factor in causing the damages.

Larson was convicted, after entry of a no contest plea, of an OWI offense in violation of Wis. Stat. § 346.63(1)(a). (24:1). An additional count of hit and run in violation of Wis. Stat. § 346.67(1) was dismissed and read in at sentencing. (24:3). As a result, the restitution statute's references to "crime considered at sentencing" include both the OWI and the hit and run offenses. *See* Wis. Stat. § 973.20(1g)-(1r).

Along with the crimes considered at sentencing, case law further instructs that a court may consider a defendant's entire course of conduct that leads to his or her conviction in determining restitution. Specifically, courts have held that "the 'crime' encompasses 'all facts and reasonable inferences concerning the defendant's activity *related to* the 'crime' for which the defendant was convicted, not just those facts *necessary* to support the elements of the specific charge of which the defendant was convicted." ***Canady***, 234 Wis. 2d 261, ¶10 (quoting ***State v. Madlock***, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999)).

For example, in ***Canady***, the defendant was convicted, among other things, of resisting arrest. ***Id***., ¶3. During the defendant's struggle with the police, he attempted to grab a pry bar to use as a weapon. ***Id***., ¶2. A police officer grabbed the pry bar and threw it away, damaging a door in the

process. ***Id***. Noting that a court may consider the defendant's entire course of criminal conduct in ordering restitution, the court held that the defendant was obligated to pay restitution for the damage to the door even though the officer, not the defendant, threw the pry bar that damaged the door. ***Id***., ¶¶10-12. Specifically, the court reasoned that the defendant's action in reaching for the pry bar *during* his crime of resisting arrest was a precipitating cause of the damage. ***Id***., ¶¶11-12.

This is not to say that the required casual nexus between a defendant's criminal conduct and damages suffered by a crime victim will exist in all cases. In ***Madlock***, 230 Wis. 2d at 326-27, the defendant operated a stolen vehicle for a short time period several days after it was reported missing. ***Id.*** at 326-27. As a result, he was convicted of operating a vehicle without consent. ***Id.*** at 327. Although no evidence was presented linking the defendant's conduct to damage to the vehicle, the circuit court ordered the defendant to reimburse an insurance company for a claim it had paid related to the vehicle. ***Id.*** at 327. The court of appeals reversed asserting that the defendant's course of conduct was not sufficiently linked to the purported damages. ***Id.*** at 326, 334. The court of appeals refuted the circuit court's restitution order explaining: "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 restitution." ***Id.*** at 334. The court of appeals concluded that the record was not sufficient to meet the victim's burden that the vehicle damage was related to the defendant's criminal conduct.

The same reasoning from ***Madlock*** applies to this case. Just because the crimes considered at sentencing—OWI and hit and run—involved the use of a vehicle does not mean that

Larson's criminal conduct was a substantial factor in the damage to R.A.C.'s vehicle or his chiropractic bills.

Specifically, the record does not demonstrate Larson's course of criminal conduct was the "but for" or a substantial factor in causing the collision that resulted in R.A.C.'s damages. R.A.C.'s testimony demonstrated his misunderstanding of both the traffic pattern at the intersection involved as well as a misunderstanding of his responsibility to yield to oncoming traffic. R.A.C. repeatedly testified that his lane did not merge into the traffic circle. However, this testimony was refuted by the police report diagram shown to him both on direct and during cross examination as well as the Google satellite image presented to him. Although R.A.C. testified that his lane did not merge into the traffic circle, he also testified that he slowed down to look for oncoming traffic and did not see any vehicles in his lane. This testimony does not make sense and it was refuted by the off-duty deputy's statement in regard to the accident.

The off-duty deputy, Schroeder, reported that he was directly behind R.A.C. and watched R.A.C. hurriedly roll through the yield sign. Schroeder indicated that the accident occurred just as R.A.C. rolled through the yield sign. Schroeder's account of the accident as well as R.A.C.'s misunderstanding of the traffic circle itself indicates that R.A.C., not Larson, was the cause of the accident. In fact, R.A.C. was cited for failure to yield as a result of the collision.[3] Larson did not receive any traffic citations.

In ordering restitution, the circuit court appeared to place great weight on R.A.C.'s testimony that he looked and did not see any oncoming vehicles in his lane. (App. 118-119; 44:56-57). In doing so, the circuit court appeared to

[3] The citation was later reduced to a traffic safety violation.

fault Larson for failing to testify about his observations prior to the accident. (App. 118-119, 44:56-57). However, it was R.A.C.'s burden, not Larson's, to demonstrate the causal nexus between Larson's criminal conduct and the damages sought.

In addition, the circuit court commented that there was no testimony in regard to the positioning of Larson's vehicle. (App. 118-119; 44:56-57). This is precisely Larson's point—the record contains no indication of Larson's course of conduct or his conduct at the time of the accident. R.A.C. presented no evidence that Larson was driving erratically prior to the accident nor did R.A.C. present any evidence in regard to Larson's conduct at the time of the accident. Rather, the record indicates that the collision occurred just as R.A.C. entered the traffic circle, that R.A.C. was cited for failure to yield, and that Schroeder observed Larson's headlights were on when he stopped at the accident scene. Although R.A.C. testified that he looked and did not see Larson's vehicle, this does allow an inference that Larson's criminal conduct set into motion the accident resulting in damages. The only reasonable inference from the record is that R.A.C., not Larson, set the accident in motion, which resulted in R.A.C.'s damages. Importantly, the record indicates that the accident would have occurred regardless of Larson's course of criminal conduct.

Larson was convicted of an OWI offense with the hit and run count dismissed and read in at sentencing. The circuit court sentenced him accordingly and he was punished for his criminal conduct. Although courts are to liberally allow victims to recover damages under the restitution statute, the purpose of restitution is not to further punish defendants. Here, the record is insufficient to show the required nexus between Larson's criminal conduct and R.A.C.'s claimed

damages. As a result, R.A.C. did not meet his burden of proving that Larson's criminal conduct was a substantial factor in causing damages; therefore, the restitution order must be vacated.

CONCLUSION

The circuit court erred in ordering Larson to pay restitution; therefore, the court's restitution order should be reversed. Larson's judgment of conviction and judgment for unpaid financial obligations should be amended accordingly.

Dated this 17th day of October, 2017.

Respectfully submitted,

ALISHA MCKAY
Assistant State Public Defender
State Bar No. 1090751

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2123
mckaya@opd.wi.gov

Attorney for Defendant-Appellant

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 3,376 words.

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 17th day of October, 2017.

Signed:

ALISHA MCKAY
Assistant State Public Defender
State Bar No. 1090751

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2123
mckaya@opd.wi.gov

Attorney for Defendant-Appellant

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Dated this 17th day of October, 2017.

Signed:

ALISHA MCKAY
Assistant State Public Defender
State Bar No. 1090751

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2123
mckaya@opd.wi.gov

Attorney for Defendant-Appellant