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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2017 AP 1610 CR

v.

DAVID M. LARSON,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE RESTITUTION ORDER
AND AN AMENDED JUDGMENT OF CONVICTION ENTERED IN
THE WINNEBAGO COUNTY CIRCUIT COURT BRANCH SIX

The Honorable Daniel J. Bissett, Presiding

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Table of Contents

Statutes & Constitutional Provisions Cited

Cases Cited

Jury Instructions Cited

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the trial court properly exercised its discretion when it found that the State had met burden to show causal nexus between the crime considered at sentencing and R.A.C.'s purported losses?

The trial court did not answer this question.

II. Whether the trial court erred in ultimately ordering Larson to pay victim restitution under Wis. Stat. § 973.20 for the cost of R.A.C.'s purported losses?

The trial court did not answer this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is requesting neither oral argument nor publication as this matter involves application of well-settled law to the facts of this case.

STATEMENT OF THE CASE

As respondent, the State exercises its option to not present a full statement of the case. See *Wis. Stat. § 809.19(3)(a)2.* Instead, for this appeal to be appropriately considered, the State will present additional facts in the argument portion of its brief, when necessary, for this appeal to be appropriately considered.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING LARSON TO PAY VICTIM RESTITUTION UNDER WIS. STAT. § 973.20 FOR THE COST OF R.A.C.'S PURPORTED LOSSES

The trial court properly exercised its discretion when it rejected Larson's argument that R.A.C. failed to establish a sufficient causal nexus between Larson's criminal conduct and R.A.C.'s purported losses, and instead found sufficient evidence for causal nexus, ordering Larson to pay victim restitution pursuant to Wis. Stat. § 973.20.

A. Standard of Review

An order for restitution is reviewed under the erroneous discretion standard of review. *State v. Canady*, 2000 WI App 87, ¶ 6, 234 Wis. 2d 261, 610 N.W.2d 147. "A request for 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." *State v. Gibson*, 2012 WI App 103, ¶ 8, 344 Wis. 2d 220, 822 N.W.2d 500 (citations omitted). The appellate court "may reverse a discretionary decision only if the circuit court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts." *Id*. However, 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 this court court reviews de novo. *State v. Lee*, 2008 WI App 185, ¶ 7, 314 Wis. 2d 764, 762 N.W.2d 431.

B. Restitution and Applicable Law

Restitution in a criminal case is governed by Wis. Stat. § 973.20. As applicable, the statute provides:

> When imposing sentence or ordering probation for any crime … for which the defendant was convicted, the court, in addition to any other penalty authorized by law, 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.

Wis. Stat. § 973.20(1r). The phrase "crime considered at sentencing," found in (1r), is defined as "any crime for which the defendant was convicted and any read-in crime." Wis. Stat. § 973.20(1g)(a)-(b).

At sentencing, the district attorney has the burden of demonstrating the victim's loss by a preponderance of the evidence. *State v. Kayon*, 2002 WI App 178, ¶ 13, 256 Wis. 2d 577, 649 N.W.2d 344; *see also* Wis. Stat. § 973.20(14)(a).

To order restitution, a court must find a "causal nexus" between "the crime considered at sentencing" and the victim's alleged damages. *Canady*, 234 Wis. 2d 261, ¶ 9. "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.'" *Id*.

The trial court's authority to order restitution also extends to "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." Wis. Stat. § 973.20(5). "The term "special damages" as used in the criminal restitution context means any readily ascertainable pecuniary expenditure paid out because of the crime." *State v. Johnson*, 2005 WI App 201, ¶12, 287 Wis. 2d 381, 704 N.W.2d 625, (quoting *State v. Longmire*, 2004 WI App 90, ¶ 14, 272 Wis. 2d 759, 681 N.W.2d 534).

Before a trial court may order restitution, "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." *Johnson*, 287 Wis. 2d 381, ¶ 13. A causal link for restitution purposes is established when "the defendant's criminal act set into motion the events that resulted in the damage or injury." *Id*. (quoting *Longmire*, 272 Wis. 2d 759, ¶ 13. "A

defendant cannot escape responsibility for restitution simply because his or her conduct did not directly cause the damage." *State v. Madlock*, 230 Wis. 2d 324, 326, 602 N.W.2d 104 (Ct. App. 1999).

Contributory negligence is not available as a defense in a restitution hearing. *State v. Knoll*, 2000 WI App 135, 237 Wis. 2d 384, 314 N.W.2d 20. *See also State v. Walters*, 224 Wis. 2d 897, 591 N.W.2d 874 (Ct. App. 1999). Section 973.20(14)(b) provides that at a restitution hearing, the defendant "may assert any defense that he or she could raise in a civil action for the loss sought to be compensated." In *State v. Sweat*, 208 Wis. 2d 409, 561 N.W.2d 695 (1997), the supreme court interpreted Wis. Stat. § 973.20(14)(b) through addressing the issue of whether the statute allows a defendant to assert the civil, rather than criminal, statute of limitations to bar individual crime victims' claim for restitution. *See Sweat*¸ 208 Wis. 2d at 411-12. The supreme court concluded that the statute does not permit a defendant to "raise, after conviction, civil defenses to liability for financial loss"; rather, the defenses relate solely to the amount of restitution that can be ordered. *See Sweat*, 208 Wis. 2d at 208.

Further, restitution is not a claim that is owned by an individual but a remedy of the State. *Knoll*, 237 Wis. 2d 384, ¶ 16. (citing *State v. Walters*,

224 Wis. 2d 897, 591 N.W.2d 874 (Ct. App. 1999). A primary purpose of restitution is to rehabilitate the defendant, which is furthered by requiring those convicted of the crimes to take responsibility for the consequences of their actions. *See id.* (citing *Huggett v. State*, 83 Wis. 2d 790, 798-99, 266 N.W.2d 403, 407 (1978)). In *Knoll*, the court of appeals found:

> To allow a defendant who has already been convicted of a crime to avoid restitution defeats this purpose because it permits him to evade responsibility for his own actions. The supreme court's statement in *Sweat* that a defendant could not raise contributory negligence as a defense, while not essential to its decision, is consistent with the mandatory nature of restitution and its goals of rehabilitation and punishment, as well as those of compensating the victim.

Id.

The restitution statute, Wis. Stat. § 973.20, is to be interpreted "broadly and liberally in order to allow victims to recover their losses as a result of a defendant's criminal conduct." *Madlock*, 230 Wis. 2d 324, 332. Restitution is the rule and not the exception, and its primary purpose is to compensate the victim for losses caused by the defendant's criminal conduct. *State v. Canady*, 2000 WI App 87, ¶ 8. "The crime considered at sentencing is defined in broad terms." *Id.* at ¶ 10. '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. *Id*.

C. The trial court appropriately exercised its discretion in finding that the State met its burden to show a causal nexus between Larson's course of criminal conduct and R.A.C.'s claim for restitution.

As the restitution hearing occurred at or prior to sentencing, the State represented R.A.C. Wis. Stat. § 973.20(14)(a). At the March 6, 2017, restitution hearing, the court heard testimony from R.A.C. regarding his version of events from the crash on November 27, 2016, along with his purported losses.

With regard to the crash, R.A.C. explained that he was driving southbound on Washburn Street towards Witzel Avenue. (R41:5). R.A.C. drives through that area numerous times every day. (R41:7). R.A.C. was driving in the far right lane as he approached the traffic circle to turn right onto Witzel. (R41:5). R.A.C. testified that he had "already rounded the apex and got hit and pushed up onto the – over the curb and onto the sidewalk." (R41:5). R.A.C. explained that he "got pushed up onto the sidewalk" on Witzel and was "heading due west straight with the road not in the entrance." (R41:8-9). R.A.C. testified that two of his wheels, both passenger side, were up over the curb on the sidewalk. (R41:9-10). The

location of the damage to R.A.C.'s vehicle is consistent with R.A.C.'s version of events. (R41:13-17; 22). Larson fled the scene after agreeing to meet R.A.C. at HuHot nearby. (R41:6).

R.A.C. agreed that there was a yield sign posted for vehicles on Washburn before the transition to Witzel occurs. (R41:25). When asked if he yielded, R.A.C. answered, "[c]ertainly." (*Id.*). When asked if he looked to his left before making the right turn onto Witzel, R.A.C. answered affirmatively, that yes he had. (R41:8). R.A.C. further testified that he saw a white SUV coming over Interstate 41 approaching the turnabout and a car coming around the other side of the circle closer to the circle. *Id.* R.A.C. further indicated that he saw lights, and that there would have been two sets of lights, one approaching and one in [the roundabout]. (*Id.*). When asked if either of those sets of lights were the vehicle that struck him, R.A.C. said that "[t]hey weren't a vehicle in my lane." (*Id.*). R.A.C. was unwavering about the fact that the white SUV that he observed was approaching over 41 that just came over the top of 41 and was going to enter the roundabout. (R41:37). R.A.C. also specified that the other car he saw was around the far side of the circle. (*Id.*). R.A.C. testified that he "told [the officer] [he] didn't

see anything in [his] lane ... because either [the defendant] didn't have his headlights or was swerving." (*Id.*).

R.A.C. was adamant that his lane was clear. (R41:38). "I know my lane was clear and I know he left the scene of the crime and I now I stuck around and I know I didn't do anything wrong and I ended up on the sidewalk after the apex of the turn because I got hit in the intersection." (R41:38-39). "I said my lane was clear so either he didn't have his headlights on or he swerved out of his lane and into my right lane." (R41:39).

When asked about being cited for failure to yield right of way, R.A.C. agreed. (R41:28). However, R.A.C. testified that it was reduced to a safety violation. (*Id.*). R.A.C. further testified that "they reduced it to a safety violation...which just meant I could have done more to avoid the accident." (*Id.*).

Prior to the restitution hearing, R.A.C. had requested $3,092.25 in restitution for purported losses stemming from his vehicle damage and chiropractic bills. (R16:1). During the hearing, R.A.C. testified extensively regarding the damage to his vehicle and basis for requesting the amount that he did. (R41:14-17; 22). R.A.C. is a life-long mechanic who well

maintains his vehicles. (R41:14). The vehicle involved was a family owned vehicle. (*Id.*). Before the crash, R.A.C. indicated that there was not a scratch on the vehicle. (*Id.*). Pursuant to the estimate from Bergstrom, damage to R.A.C.'s vehicle consisted of the left front fender, the grille, the whole skirt on the front, the bumper skirt, the left rear quarter panel, a passenger side rim that had struck the curb, and a hole in the sidewall of the right front tire. (R41:13). R.A.C. further testified that he was not requesting the amount that Bergstrom estimated needs to be done. (R41:16). Rather, R.A.C. was requesting the Kelley Blue Book "private party" price. (*Id*.). R.A.C. "was trying to be as fair as he could." (*Id*.).

R.A.C. also testified at length about the injuries he sustained from the November 27, 2016, crash and chiropractic needs since then. (R41:11-12; 17-22). R.A.C. testified that he is still in pain from the crash, and still needs to get manipulated for this "new pain." (R41:17). R.A.C. testified that Dr. Belville was treating him specifically for this incident. *(Id.*). R.A.C. indicated that he thought he might get somewhere in about a month, but, he sleeps four hours and wakes up with pain in his shoulder and neck and Dr. Belville says it's from that. (*Id.*).

After hearing argument from the parties, the trial court took a lengthy recess. (R41:49). During that recess, the court reviewed the exhibits, restitution statute, § 973.20, case law including *Knoll* and *Johnson*, along with Wisconsin civil jury instructions for contributory negligence (Wis. JI-Civil 1007 Contributory Negligence) and look-out (Wis. JI-Civil 1055 Look-out). (*Id*.). The trial court then made a detailed record of the relevant portions of the *Johnson* and *Knoll*. (R41:54). The court first considered *Johnson* for the nexus required for purposes of liability within a restitution claim. (R41:49-51). The trial court then discussed *Knoll*, a drunk driving case that dealt with the issue of contributory negligence. (R41:51-53). The trial court quoted the court of appeals in *Knoll* which quoted the supreme court in *Sweat*, with regard to the finding that contributory negligence is not a defense with regard to restitution. (*Id.*). The trial court further quoted the civil jury instructions for look-out and contributory negligence. (R41:53-54).

The trial court then applied the law to the facts of this case and provided a lengthy reasoning as to why it ultimately found that the State had met its burden of proof for a restitution award. (R41:54-59). The court accepted R.A.C.'s testimony that he looked to his left, saw a white SUV not

in the roundabout area but coming over the bridge of the freeway and another vehicle in another lane. (R41:54). The court acknowledged R.A.C.'s testimony that he did not feel there were any vehicles in his lane. (*Id*.). The court further noted that R.A.C. proceeded and was struck by Larson. (R41:54-55). The court further acknowledged the read-in offense of hit-and-run where Larson did not stop. (R41:55).

The court then specifically addressed and rejected Larson's argument that there is insufficient causal connection to warrant restitution. Instead, the court found that R.A.C. did have look-out, that he did look and did not see any vehicles in the lane:

> The defendant is indicating that because the victim was cited here by officers, as well as based on the statements of the off-duty officer that was behind the defendant's vehicle, that the Court should not find that there is the requisite nexus or causation in this case to warrant the restitution award, that there is some discrepancy with regards to the headlights on, whether there was any type of vehicle in the lane, as to the general structure of this particular roundabout.
>
> And what we do have today – And these are hearings as the Court has pointed out and as the case law that I pointed out indicates, they are informal type of proceedings. All the rules of evidence don't apply. 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 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…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.

(R41:56-57; Wis. JI-Civil 1055, Look-out).

The court further provided a basis for the specific amount of restitution, but the specific amount is irrelevant as Larson challenges whether any restitution ought to have been order, not the specific amount. (R41:55-59).

In terms of the crash, Larson continues to place all blame on R.A.C. Larson places great weight on the fact that R.A.C. was cited for the incident for failing to yield. Larson argues that the facts of this case are analogous with the facts in *Madlock* and the same "ipso facto" reasoning should follow: "[j]ust 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." (Brief of Defendant-appellant:11).

Larson further argues that the trial court shifted the burden to Larson when it "appeared to fault Larson for failing to testify about his observations prior to the accident." (Brief of Defendant-appellant:11-12).

However, what defense ignores is the nature of the crime(s) considered at sentencing and reasonable inferences concerning the defendant's activity related to the crime(s). Larson had been convicted of Operating a Motor Vehicle While Under the Influence in violation of Wis. Stat. § 346.63(1)(a) for the fourth time. (R24:1). A count of Hit and Run in violation of Wis. Stat. § 346.67(1) was dismissed but read-in at sentencing. (R24:3).

Pursuant to Wisconsin Jury Instruction – Criminal 2669 Operating a Motor Vehicle While Under the Influence of an Intoxicant, the second element that the State must prove is that the defendant was under the influence of an intoxicant at the time the defendant drove/operated a motor vehicle. "Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage. Wis. JI-Criminal 2669. "What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise clear judgment and steady hand necessary to handle and control a motor vehicle." *Id*. The State must establish "that the person's ability to safely control the vehicle be impaired." *Id.*

Larson was operating a motor vehicle while his ability to safely control it was impaired as demonstrated by the specific facts of this case. Larson struck R.A.C.'s vehicle as R.A.C. was turning right. R.A.C. testified that he looked and not see any vehicles in his lane. R.A.C. testified that Larson must not have had his lights on because he did look and there were no vehicles in his lane. Based on the record established, the course of Larson's criminal conduct includes his decision to get behind the wheel while under the influence to a degree that rendered him unable to handle and control his vehicle safely. Larson's impaired state is demonstrated by his vehicle striking R.A.C.'s vehicle, and later fleeing the scene of the accident. Larson argues that his decision to leave the scene of the accident was because he was intoxicated. (R41:44). However, it is also reasonable to infer that he left because he felt partly responsible for the crash. As is supported by the record, it is reasonable to infer that Larson's impaired state behind the wheel set in motion the accident resulting in damages.

Based on the foregoing meticulous record, the trial court demonstrated its use if the appropriate legal standard and grounded its decision on a logical interpretation of the facts. Furthermore, the trial court properly exercised its discretion when it rejected Larson's argument and

found that the State met its burden to show requisite causal nexus between Larson's course of criminal conduct and R.A.C.'s purported losses. Contributory negligence is not available as a defense in a restitution. The trial court's decision to rule out contributory negligence was consistent with *Knoll* and the mandatory nature of restitution and its goals of rehabilitation and punishment, and as well as those of compensating the victim.

Therefore, the trial court properly ordered Larson to pay victim restitution under Wis. Stat. § 973.20 for the cost of R.A.C.'s purported losses.

CONCLUSION

For the reasons set forth above, this court should affirm the trial court's restitution order and uphold its findings that 1) the State met its burden to show causal nexus between the crime considered at sentencing and damage to R.A.C.'s vehicle and body; and accordingly 2) the trial court properly ordered Larson to pay restitution under 973.20 for the cost of R.A.C.'s purported losses.

Dated at Oshkosh, Wisconsin, this _____ day of November, 2017.

_____
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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,646 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Dated at Oshkosh, Wisconsin, this 16th day of November, 2017.

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