STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP1610-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID M. LARSON,

Defendant-Appellant.

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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.

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# REPLY BRIEF OF DEFENDANT-APPELLANT

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## 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.

Before ordering restitution, a court must find the existence of a causal nexus between the crimes considered at sentencing and the damages requested. ***State v. Madlock***, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999). At the restitution hearing, the burden was on R.A.C. to demonstrate by a preponderance of the evidence that Larson's course of criminal conduct was a "substantial factor" in causing the purported damages. *See* ***id.***; *see also* ***State v. Canady***, 2000 WI App 87, ¶10, 234 Wis. 2d 261, 610 N.W.2d 147. Whether Larson's operating while intoxicated (OWI) conviction or the hit and run charge dismissed and read in at sentencing was a "substantial factor" in causing R.A.C.'s damages depends on whether "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." *See* ***State v. Johnson***, 2005 WI App 201, ¶13, 287 Wis. 2d 381, 704 N.W.2d 625.

### A. The record does not support the circuit court's conclusion that Larson caused R.A.C.'s damages.

R.A.C. repeatedly testified that his lane did not merge into the traffic circle where the accident occurred. (44:5, 6, 7, 9, 25-26, 28). He testified: "I didn't enter the turnabout. I wasn't even in the turnabout lane. It's a separate, single lane merging onto Witzel bypassing the turnabout." (*Id.* at 7).

However, the diagram of the traffic circle contained in the accident report, the Google satellite image of the traffic circle shown to R.A.C. during cross-examination, and off-duty deputy Kyle Schroeder's statement all dispute R.A.C.'s recollection of the traffic circle. (*Id.* at 6-7, 28; 23:5, 11). The state does not dispute Larson's assertions that R.A.C. both misunderstood the traffic pattern and that he was cited for failure to yield as a result of the accident.

Despite R.A.C.'s insistence that his lane did not merge into the traffic circle, he also testified that he looked to his left and saw no vehicles in his lane. (44:8, 37-39). As the state sets forth, R.A.C. testified that he did see one vehicle on the freeway bridge and another vehicle in the traffic circle that was not in his lane. (*Id.* at 8; State's Resp. at 8, 12).

The state asserts that R.A.C.'s testimony that he did not see a vehicle in his lane is evidence of Larson's inability to control his vehicle. (State's Resp. at 15). R.A.C.'s testimony, however, does not give any indication of Larson's conduct. In fact, R.A.C.'s testimony demonstrates that not only did he not see any vehicle in his lane, but that he did not see Larson's vehicle at all. R.A.C. surmised that Larson must have swerved or had his lights off; however, this was pure speculation as R.A.C. also testified that he saw two vehicles when he looked left neither of which were Larson's vehicle. (*See* 44:8).

In ordering restitution, the court also relied on R.A.C.'s testimony that he looked to his left and saw no vehicles in his lane. The court stated that R.A.C.'s testimony demonstrated that "[h]e did not feel that there were any vehicles in his lane." (44:54). However, the court also indicated that no witnesses testified to Larson's conduct and then stated: "So we really have the victim's statement that he

did have look-out, that he did not see any vehicles in the lane." 44:56-57). In addition, despite R.A.C.'s insistence that he looked for oncoming traffic, Schroeder reported that R.A.C. appeared to be in a hurry and rolled through the yield sign just prior to the accident occurring. (23:11). Furthermore, Schroeder reported that the headlights on Larson's vehicle were in use when he pulled up next to the accident just moments after it occurred. (*Id.*).

In sum, R.A.C.'s testimony that he looked for oncoming traffic and saw no vehicles in his lane lends no support that Larson's conduct caused R.A.C.'s damages. Rather, the record indicates that (1) R.A.C. hurriedly entered a traffic circle without understanding the traffic pattern, (2) R.A.C. didn't see Larson's vehicle, (3) the accident occurred just as R.A.C. rolled through the yield sign, and (4) R.A.C. was cited for failure to yield. Because the record gives no indication that Larson's criminal conduct was a "substantial factor" in causing the collision that led to R.A.C.'s damages, R.A.C. did not carry his burden and the restitution order must be vacated.

B. The jury instructions on lookout and contributory negligence and case law pertaining to contributory negligence are not relevant to whether the required causal nexus exists between Larson's criminal conduct and R.A.C.'s purported damages.

The state contends that the circuit court's restitution order should be upheld because the court engaged in a lengthy discussion of ***State v. Knoll***[1] and ***State v. Johnson***[2]

[1] ***State v. Knoll***, 2000 WI App 135, 237 Wis. 2d 384, 614 N.W.2d 20.

and because it considered jury instructions on lookout[3] and contributory negligence[4] in reaching its decision. (State's Resp. at 11). The circuit court correctly recited the law on the causal nexus requirement contained in ***Johnson***. (44:49-51). However, the court also relied on ***Knoll***, which held that contributory negligence is not an available defense at a restitution hearing. ***Id.***, 237 Wis. 2d 384, ¶¶16-17. (44:57). ***Knoll*** has no application to this case.

In ***Knoll***, the defendant and two co-workers drank heavily together for several hours before leaving a tavern with Knoll behind the wheel. ***Id.***, ¶¶2-4. Knoll crashed and all three men were injured. ***Id.***, ¶4. The circuit court awarded partial restitution to one of the co-workers, Faust, and Knoll appealed arguing that Faust was owed no restitution because Faust was contributorily negligent based, in part, on assertions that Faust purchased alcohol for him knowing he would be driving everyone later in the evening. ***Id.***, ¶¶6, 10, 12. The court of appeals rejected Knoll's argument and held that contributory negligence cannot be raised as a defense to restitution. ***Id.***, ¶17. It reasoned: "To allow a defendant who has already been convicted of a crime to focus on the action of a victim to avoid restitution defeats this purpose because it permits him to evade responsibility for his own actions." ***Id.***, ¶16.

The problem with the circuit court's reliance on ***Knoll*** and the jury instruction on contributory negligence is that the court merged the holding and reasoning from ***Knoll*** on contributory negligence with the casual nexus requirement. Under ***Knoll***, contributory negligence is not a defense to

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[2] ***State v. Johnson***, 2005 WI App 201, 287 Wis. 2d 381, 704 N.W.2d 625.

[3] Wis. JI-Civil 1055.

[4] Wis. JI-Civil 1007.

restitution; however, this holding has no bearing on Larson's argument that R.A.C. failed to establish the required causal nexus between Larson's criminal conduct and R.A.C.'s purported damages. Put differently, Larson has never argued that R.A.C. was partially responsible for his own damages like the defendant in ***Knoll*** had argued. Had Larson made this argument it would be barred by ***Knoll***. Instead, Larson asserts that his conduct did not cause R.A.C.'s injuries.

Moreover, Larson's focus on R.A.C.'s conduct is not because Larson is attempting to "evade responsibility for his own actions." *See* ***Knoll***, 237 Wis. 2d 384, ¶16. Attention to R.A.C.'s conduct is necessary in this case to place Larson's conduct in context and to dispute the assertion that Larson's criminal conduct caused R.A.C.'s injuries. While contributory negligence and the casual nexus requirement may seem related, they are separate constructs; therefore, neither ***Knoll*** nor the contributory negligence jury instruction is instructive.

Similarly, the circuit court's reliance on the lookout jury instruction is misplaced because the "lookout" duty described in Wis. JI-Civil 1055 addresses a driver's responsibility to take care to watch for potentially dangerous driving situations to avoid negligent driving behavior. The instruction, in part, states: "The failure to use ordinary care to keep a careful lookout is negligence." Wis. JI-Civil 1055. The fact that R.A.C. testified that he looked to his left and saw no vehicles in his lane, does not implicate the civil jury instruction on lookout because, again, Larson does not assert contributory negligence as a defense. Consideration of whether R.A.C. maintained proper "lookout" as that term is defined in the civil jury instructions does not answer the question of whether Larson's criminal conduct was a "substantial factor" or the "but for" cause of R.A.C.'s losses.

C. The nature of the crimes considered at Larson's sentencing alone cannot satisfy the "causal nexus" requirement for restitution.

The state contends that Larson's OWI conviction alone provides the causal nexus necessary for the court to order restitution because of the nature of drunk driving itself. (State's Resp. at 14). The state points to the "under the influence of an intoxicant" element of OWI set forth in Wis. JI-Criminal 2669 and the definition of that phrase, which includes that "the person be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." Wis. Stat. JI-Criminal 2669. (State's Resp. at 14).

The fact of Larson's OWI conviction alone cannot establish the causal nexus requirement for restitution. Wisconsin case law instructs that "for a restitution order to be appropriate, the crime must have some nexus to the damage." ***Madlock***, 230 Wis. 2d at 334. The defendant's conduct must be "the precipitating cause of the injury . . . ." ***State v. Behnke***, 203 Wis. 2d 43, 59, 553 N.W.2d 265 (Ct. App. 1996). Larson's conduct here should not be lauded, but neither can it be shown to have "some nexus to the damage" or "the precipitating cause of the injury." There is no indication that Larson engaged in any behavior to cause the collision with R.A.C. All indications are instead that the accident would have occurred had Larson not been driving under the influence. In addition, the fact that a collision occurred does not demonstrate that Larson's criminal conduct was the precipitating cause of R.A.C.'s damages.

Under the state's argument, an OWI conviction alone without regard to the defendant's particular conduct would always result in restitution for damages sustained by another

driver because the state's argument removes the causal nexus requirement for restitution requests in OWI cases. For example, suppose an intoxicated driver is appropriately stopped at a red light when she is rear ended by an inattentive driver. Under the state's argument, the inattentive driver is owed restitution for any damages that result under this scenario for the mere fact that the other driver was intoxicated. An application of the state's argument results in an unreasonable result devoid of causal nexus analysis.

Finally, the state contends that the hit and run charge dismissed and read in at Larson's sentencing supports its position that Larson caused R.A.C.'s damages. (State's Resp. at 15). The state posits that a possible reason for Larson's leaving the scene of the accident was because he "felt partly responsible for the crash." (*Id.*). Setting aside the speculative nature of this assertion, Larson's conduct after the accident does not answer the question of whether his criminal conduct was a "substantial factor" in causing R.A.C.'s damages.

The purpose of the restitution statute is to make victims of crime whole. ***Canady***, 234 Wis. 2d 261, ¶8. Another purpose is to encourage rehabilitation by requiring defendants to be responsible for the consequences of their actions. ***Knoll***, 237 Wis. 2d 384, ¶16. However, as the recent dissent in ***State v. Wiskerchen*** explains, the importance of the restitution statute in our criminal justice system and the purposes it serves cannot serve as substitutes for the requirements of the restitution statute. *See* ***id.***, No. 2016AP1541-CR, publication determination pending, ¶46 (Wis. Ct. App. Nov. 1, 2017) (Hagedorn, J., dissenting). (Reply App. 108). Here, 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 Larson's sentencing. As a result, 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 28th day of November, 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 2,033 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 28th day of November, 2017.

Signed:

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