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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2017AP002519-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MICHAEL A. RAKEL,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION
IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
THE HONORABLE MARK A. SANDERS PRESIDING
MILWAUKEE COUNTY CIRCUIT COURT CASE NO. 15CF5146

BRIEF OF DEFENDANT-APPELLANT

Bradley J. Lochowicz
(State Bar No. 1037739)

LOCHOWICZ & VENEMA LLP
Attorneys for Defendant-Appellant

11 1/2 N. Wisconsin Street
P.O. Box 20
Elkhorn, WI 53121-0470

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STATEMENT OF THE ISSUES

- I. DID THE COURT HAVE AUTHORITY TO ORDER RAKEL TO PAY CHILD SUPPORT FOR THE DECEDENT'S CHILD AS PART OF RESTITUTION.

Trial Court Answered: Yes.

- II. DID THE COURT ORDER RESTITUTION PAYABLE TO THE PROPER PARTY WHERE THE COURT ORDERED PAYMENTS TO THE MOTHER OF THE VICTIM'S CHILD.

Trial Counsel Answered: Not Answered.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant believes that the briefs will fully present and meet the issues on appeal and will fully develop the theories and legal authority governing the issues, and therefore oral argument would be of little value to the court as the law applicable to this case is already well settled.

STANDARD OF REVIEW

The scope of a Circuit Court's authority to make orders regarding restitution is a question of Statutory Construction, subject to de novo review. State v. Johnson, 2002 WI App 166, P7, 256 Wis.2d 871, 649 N.W.2d 284 (Ct. App. 2002) (Citing State v. Baker, 2001 WI App 100, P4, 243 Wis.2d 77, 626 N.W.2d 862. The Circuit Court's restitution orders, on the other hand, are discretionary acts which are only

examined to determine whether the court logically interpreted the facts, applied the proper legal standards, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. Johnson, 2002 WI App 166 at P7. Circuit Courts have discretion in deciding on the amount of restitution and in determining whether the defendant's criminal activity was a substantial factor in causing any expenses for which restitution is claimed. State v. Canady, 2000 WI App 87, P6, 12, 234 Wis.2d 261, 610 N.W.2d 147.

STATEMENT OF CASE/FACTS

On November 29, 2015, the Defendant, Michael A. Rakel was charged in Milwaukee County Case Number 15-CF-5146 with one count of First-Degree Reckless Homicide as Party to a Crime, Habitual Criminality Repeater, Use of a Dangerous Weapon, contrary to sections 940.42(1), 939.50(3)(b), 939.05, 939.62(1)(c), and 939.63(1)(b) Wis. Stats. and Attempted Armed Robbery use of Force as Party to a Crime, Habitual Criminality Repeater, contrary to sections 943.32(1)(a) and (2), 939.50(3)(c), 939.32, 939.05, 939.62(1)(c), Stats. (R1-3)

According to the Criminal Complaint on October 16, 2015, Milwaukee Fire Department Engine No. 31 was dispatched to a

subject down near the bridge at South 9th Place and West Harrington Avenue. (R1:3) Upon arriving, the Fire Department notified the Milwaukee Police Department that the subject, later identified through fingerprints as AT was deceased. (R1:3) The City of Milwaukee Police Department was dispatched to the scene. (R1:3)

City of Milwaukee Police Detective Larry Schimke conducted an investigation of the scene. (R1:3) The victim's body was discovered on the south concrete embankment of the Kinnickinnic River, just to the west of the South 9th Place Bridge, in the City and County of Milwaukee, State of Wisconsin. (R1:3) The victim's body was laying face down and was partially concealed due to being dragged into an opening within the concrete embankment. (R1:3) Directly above from where the victim's body was discovered was a large area of grass covered in blood. (R1:3) According to the complaint, there was a distinct drag path that led from the grass to the concrete embankment and into the opening to the embankment where the victim was discovered. (R1:3)

The victim was wearing a black t-shirt with an emblem depicting a gold crown and wings on the front over a white t-shirt, black shorts and blue boxers. (R1:3) The shorts and

boxers were pulled down to the victim's lower legs exposing his buttocks. (R1:3) The complaint alleges that the shorts and boxers were pulled down because the victim was dragged down the embankment. (R1:3) An examination of the victim's body revealed numerous sharp force injuries, believed to be stab wounds, to his left upper back, left shoulder, left abdominal flank, base of neck and behind the right ear. (R1:3)

On the east side of South 9th Place and just to the south of the bridge laying in the gutter was a black and white head bandana. (R1:3) Near the bandana on the grass parking strip was a pack of Newport cigarettes and a lottery ticket. (R1:3) There was a small amount of suspected blood on the cigarette pack and lottery ticket. (R1:3) There were small drops of blood located on the asphalt foot path to the west of the victim's body. (R1:3) There were additional blood drops at the north end of the dead-end alley between South 9th Place and South 10th Street. (R1:3)

Detective Schmike conducted a vehicle fire investigation on October 16, 2015 at 2629 South 7th Street. (R1:3) The vehicle was identified as a black 2001 GMC Yukon Denali. (R1:3) A check revealed that the vehicle was registered to the victim, AT (R1:3) The vehicle suffered extreme fire

damage. (R1:3) A later search of the vehicle by Milwaukee Police Detective Jeffrey Sullivan revealed suspected blood recovered from the driver's door, the driver's rear door, the passenger rear door, underneath the hood of the car near the air filter box, fuse box, and inside the driver and passenger door pocket areas. (R1:3) It is alleged that the appearance of the blood is consistent with someone searching throughout the vehicle for items. (R1:3)

Dr. Jacob Smith, an assistant medical examiner from Milwaukee County, performed an autopsy of AT and determined the victim had suffered fifteen (15) apparent puncture wounds from an unknown type of sharp object to the neck, chin, forehead, arms, shoulder, and flank. (R1:4) Additionally, Dr. Smith determined the victim suffered an additional six (6) incision wounds caused by an indeterminate sharp object to the hand, forearm, and head. (R1:4) The victim also had abrasions to his knees, right ankle, left buttock, and back. (R1:4) The injuries were determined to be consistent with falling down or being dragged. (R1:4) Dr. Smith determined that the cause of the victim's death was multiple stab wounds and the manner of death was homicide. (R1:4) Dr. Smith determined, to a reasonable degree of medical certainty, that

the cause of the victim's death was multiple stab wounds and the manner of death was homicide. (R1:4)

Detective Michael Walisiewicz interviewed an individual by the name of Amber Pries, a co-actor. (R1:4) Pries indicated she knows both defendant, Roxanne Gray, a former girlfriend and the defendant, Michael Rakel, Gray's new boyfriend. (R1:4)

Pries indicated that she was present when Gray and Rakel were involved in an attempt to rob the victim that ended up with the victim being killed. (R1:4) Pries told the detective that on the night of the homicide Gray called her and told her to get dressed up. (R1:4) When she asked Gray why she needed to get dressed up, Gray told her not to worry. (R1:4) Pries stated that when Gary came to get her, Gray told Pries that Gray's drug dealer was coming, and they were going to get some "stuff" off of him. (R1:4) Pries stated that Gray told her they were going to get three grams of heroin and two grams of crack. (R1:4) Pries indicated that she asked Gray where she was going to get the money and Gray told her not to worry. (R1:4)

Pries stated that Gray and Rakel came to her house and picked her up in a white car. (R1:4) All three of them then

traveled to 11th and Cleveland where Rakel dropped off Pries and Gray on the street. (R1:4) Pries told the detective that Rakel parked the car somewhere and came back on foot. (R1:4) Pries stated that Gray told Rakel to hide. (R1:4) Pries then asked Gray if they were going to rob the individual. (R1:4) Pries told Gray that they were going to rob the individual. (R1:4) Gray told Pries that when the victim gets there to walk around the side and get into the side of the victim's vehicle. (R1:4) Pries stated that she told Gray "ok, whatever." (R1:4) She indicated that Rakel was hiding by a parked car. (R1:4)

Pries told the detective that the victim showed up driving a truck or SUV type of vehicle. (R1:4) She indicated they were on 10th Street next to the park. (R1:4) She stated that the victim pulled up and Gray got into the passenger seat of the victim's vehicle while Pries walked around the side to get into the back of the vehicle. (R1:4) She indicated that as she was getting into the back, Rakel came up from her side and snatched the victim out of the truck. (R1:4) Pries stated that she dove into the front seat and put the car in park because it was still in drive. (R1:4)

Pries told the detective that when Rakel pulled the victim out of the truck, she observed Rakel punching the victim. (R1:4) She indicated the victim was able to run away and Rakel and Gray ran after him. (R1:4) Pries stated she stayed in the truck and a little bit later Rakel and Gray came back and got into the truck and told her to go. (R1:4-5) She told the detective that Rakel had a "pokey stick," which she described as a "shish-ke-bob stick" (R1:5) Pries further stated that Gray had a pocketknife or a regular knife. (R1:5) She indicated Gray was in the front passenger side and Rakel got into the back seat. (R1:5) Pries further stated that Gray had blood on her face, like "mist," and she told Pries that it was from Gray and Rakel punching the victim. (R1:5) Pries further stated that as the three of them were leaving Gray pulled out the knife. (R1:5) Pries asked Gray if she just stabbed the guy to which Pries indicated she did. (R1:5)

Pries indicated that she drove the truck to 7th Street. (R1:5) She told the detective that they then went back to the Pries' house and noticed Rakel had blood all over his pants. (R1:5) Pries stated that Rakel and Gray were talking about

having to get the blood off of them before they went back to the house. (R1:5)

Pries stated that Rakel washed his pants off in her bathtub and that he took a pair of her sweatpants to wear. (R1:5) Rakel took the jeans with him. (R1:5) Pries told the detective that after Rakel changed his pants, he and Gray left again and went back down by the victim. (R1:5) Pries believed that Rakel and Gray took the victim's pants. (R1:5)

Pries told the detective that she remembered somebody ditching something as they were walking away from the truck. (R1:5) She also indicated that she saw Gray throw something in a bush. (R1:5) She indicated that she believed Gray went under the hood of the car just before she set it on fire. (R1:5) She believes that Gray went under the hood of the vehicle looking for drugs. (R1:5)

On December 1, 2015, Rakel made his initial appearance. (R44:2) A preliminary hearing was scheduled December 9, 2015. On December 9, 2015 a preliminary hearing was held before the Honorable Barry Phillips. Based upon the evidence at the preliminary hearing, the court bound Rakel over for trial.

Prior to the plea hearing, the State filed a fourth amended information charging Rakel with one count of First-

Degree Reckless Homicide as Party to a Crime, contrary to sections 940.02(1), 939.50(3)(b) and 939.05, Stats. (R16:1) On the same date, January 9, 2017, Rakel entered a guilty plea to the charge. (R56:5) The plea hearing was held before the Honorable Jeffrey A. Wagner. (R56:2) At said hearing, Rakel entered into a plea agreement in which he would plead to the amended charge of First Degree Reckless Homicide as Party to a Crime, with the State recommending thirty (30) years confinement but remaining silent as to the length of extended supervision. (R56:5-6) (R17:2) Additionally, Rakel would be free to argue for what he believed to be a reasonable sentence. (R56:5-6) (R17:2)

On March 23, 2017, a sentencing hearing has held before the Honorable Mark A. Sanders. (R57:2)

The court sentenced Rakel to thirty (30) years of initial confinement and ten (10) years extended supervision for a total sentence of forty (40) years imprisonment. (R57:83) The court ordered this sentence consecutive to any other sentence Rakel was serving. (R57:83)

On August 25, 2017, a Restitution Hearing was held before the Honorable Mark A. Sanders. (R59:3) (A:5) At the restitution hearing, the State, on behalf of the victim,

requested child support to be payable by Mr. Rakel to the biological of the decedent's child, L.G. (R59:5-6) (A:7-8) On behalf of Mr. Rakel, trial counsel objected to child support being paid as part of restitution. (R59:7) (A:9) Following arguments by all parties, the court ordered Rakel to pay the biological mother of victim's child, in the amount of \$11,500.00 calculated as \$165.00 for the next seventy (70) months, as child support. (R: p.19-20) (A:21-22)

The court ordered other restitution amounts which are not a subject of this appeal.

This appeal follows.

ARGUMENT

I. THE COURT ERRED IN ORDERING RAKEL TO PAY CHILD SUPPORT TO THE MOTHER OF THE DECEDENT'S CHILD FOR RESTITUTION.

Section 973.20 Stats., governs restitution awards for criminal convictions in Wisconsin. The statute requires the court, at the time of sentencing, to make an order requiring "full or partial restitution" to the victim or the victim's estate if the victim is deceased. Section 973.20(1)(r) Stats. The statute has specific provisions allowing different types of restitution awards for property damage, sex crimes, crimes involving bodily injury, and crimes involving death. The statute also has a catch-all provision allowing the court to

require the defendant to pay all "special damages but not general damages, substantiated by evidence in the record which can be recovered in a civil action." Section 973.20(5)(a), Stats. This statute makes no reference to authorizing the court to order "child support."

The Statute allows the court to order restitution for bodily injury by paying for medical and other professional services. Section 973.20(3), Stats. The Order may also "reimburse the injured person for income loss." Section 973.20(3)(c), Stats. If the crime resulted in death, the restitution order can compensate the victim for "funeral and related services." Section 973.20(4), Stats. However, there is no provision which specifically provides that the court can compensate the dependents of the victim for loss with financial support.

There is language in the restitution statute with specifically address lost income. Section 973.20(3)(c), Stats., Provides that the court may "reimburse the injured person for income lost as a result of a crime considered at sentencing." It is true that a "victim" is not defined as only the injured person, it can also be a family member of the injured person. See section 950.02(4)(a)4a; See also

State v. Gribble, 2001 WI App 227. P67, 248 Wis.2d 409, 636 N.W.2d 488 (Ct. App 2001). However, the Statutory provision allowing reimbursement for lost income does not appear to extend to dependent minor children. Said language contained in Section 973.20(3)(c), Stats., only allows payment of lost income to "the injured person" not "the victim" the clear language of the Statute limits the courts ability to order payment of lost wages to only the person who suffered bodily injuries not others.

Another provision of the Restitution Statute, Section 973.20(5)(b), Stats., allows restitution for income loss and other expenses against "the person whom a crime considered at sentencing was committed" this language does not use the word "victim" and does not include family members of the victim. The language specifically excludes everyone except the person against whom crime was committed.

The Restitution Statute simply contains no language allowing for payment of lost wages or any other financial support to anyone other than the injured person. There is no other specific provision found in the restitution statute which would allow the court to make such order for child support.

Even though the restitution statute does not expressly authorize payment of child support as lost wages and contains no other specific authority for ordering support to a deceased victim's family, the question remains whether child support can be ordered as a special damage pursuant to section 973.20(5)(a), Stats., which provides that the court can order payment of all special damages. Child Support cannot be a special damage under this section because it can be adequately substantiated with the particularly lost support amounts would be. Simply, it is a speculative damage.

Section 973.20(5), Stats., provides that "in any case the restitution order do one or more of the following:"

- (a) Pay all special damages, but not general damages substantiated by evidence in the records, which could be recovered in a civil action against the defendant of his or her conduct in the commission of a crime considered at sentencing.

Section 973.20(5)(a), Stats.

The distinction between special and general damages has been drawn in many ways. Special damages have been defined as those "representing the victim's actual pecuniary losses." State v. Rouse, 2002 WI App 107, P8, 254 Wis.2d 761, 647 N.W.2d 286 (Ct. App 2002 (Quoting State v. Stowers, 177 Wis.2d 798, 804-805, 503 N.W.2d 8 (Ct. App 1993)). General damages,

on the other hand, are those (not readily susceptible to direct proof or easily estimable.) Id. In addition special damages are defined as those that which can be recovered as special damages in a civil proceeding. State v. Rouse, 2002 WI App 107, P12, 254 Wis.2d 761, 768, 647, N.W.2d 286. While lost wages can be characterized as special damages in civil proceedings, the issue involving child support is not necessarily the equivalent of lost wages. In this case, the question is whether the amount that a deceased individual would spend to care for his or her child is a "special damage." The trial court specifically ordered that Rakel would pay a sum equivalent to the current child support order that was in place after taking into consideration a reduction of social security payments being paid to the victim's child.

Considering the administrative provision for setting child support contained in Wisconsin's administrative code, it may make sense to adopt those standards as a method to calculate the amount of support for a deceased victim's child. The actual amount the deceased victim would have spent on the support of his minor child is impossible to determine on the record as set forth in court. Yet the restitution statute does not allow speculation. Special damages are damages meant

to compensate actual pecuniary losses. See State v. Rouse, 2002 WI App 107, P8. It is too speculative to say that the administrative percentages in calculating support for divorced and unmarried parents under the administrative code are a fair reflection of the amount of support that the deceased victim in this case would have actually provided to this minor child. As such, child support is not a special damage.

Further, child support is not a proper damage for a civil action for a wrongful death claim. Rather, the statutes provide various other type of damages that can be brought by the decedent's estate in a civil action. Therefore, child support is not a proper order for restitution.

II. THE COURT ERRED BY ORDERING RESTITUTION TO BE PAID TO THE MOTHER OF THE VICTIM'S CHILD.

Even if this court determines that child support is allowed to the victim's child under the restitution provisions in section 973.20, Stats., the court erred in directing any payments to be made to the mother of the victim's child.

Section 973.20(3), Stats., advises this court as to the types of restitution orders that can be made for a crime at sentencing resulting in bodily injury. Section 973.20(3),

Stats. Section 973.20(4), Stats., then makes clear that "(i)f a crime considered at sentencing resulted in death, the restitution order may also require that the defendant pay an amount equal to the cost of necessary funeral and related services under section 895.04(5). However, counsel is aware that section 973.20(5), Stats., provides that restitution may require an individual to pay all special damages, substantiated by evidence on the record, which can be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing. While Rakel has already argued that child support is not a special damage, assuming the court finds differently, the court must be guided by the Wisconsin Statutes as to whom payments are to be made.

Section 895.04, Stats., outlines who can be considered a Plaintiff in a wrongful death action. Section 895.04(2), Stats., directs the court to ensure that any wrongful death award be set aside for a minor child under the age of eighteen years who support the deceased legal charged to pay. Section 895.04(2), Stats. There are additional factors that the court is to consider in determining the amounts for any damages received for wrongful death which are to be set aside for a

minor child. While Rakel takes the position that child support is not properly considered to be a special damage, if this court determines otherwise, section 895.04, Stats., makes clear that these funds for the victim's wrongful death shall be set aside in the name of the minor child rather than the mother of the minor child. Therefore, if this court concludes that child support to be paid by defendant is proper under the restitution statute, then this court should determine that the child support claim is really one that should be considered under section 895.04, Stats., and should be set aside solely for the benefit of the minor child.

CONCLUSION

For the aforesaid reasons, Rakel respectfully requests that the Court of Appeals remand this matter back to the Circuit Court to vacate the Order for Child Support. In the alternative, any restitution order made for the benefit of the minor child should be paid directly to the victim's child.

LOCHOWICZ & VENEMA LLP

By: //s/ Bradley J. Lochowicz
Bradley J. Lochowicz
State Bar No. 1037739

11 1/2 North Wisconsin Street
P.O. Box 20
Elkhorn, WI 53121-0470
Telephone: (262) 379-2095

CERTIFICATION

I certify that this brief conforms to the rules contained in s. 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 19 pages.

Dated this 13th day of March, 2020.

//s/ Bradley J. Lochowicz
Bradley J. Lochowicz
SBN: 1037739

CERTIFICATION 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 s. 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 13th day of March, 2020.

LOCHOWICZ & VENEMA LLP

By: //s/ Bradley J. Lochowicz
Bradley J. Lochowicz
State Bar No. 1037739

LOCHOWICZ & VENEMA LLP

11 1/2 North Wisconsin Street
P.O. Box 20
Elkhorn, WI 53121-0470
Telephone: (262) 379-2095

CERTIFICATION

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 s. 809.19(2)(a) and that contains, at a minimum:

- (1) a table of contents;
- (2) the findings or opinion of the circuit court; and
- (3) 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.

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 first names and last initials 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.

Dated this 13th day of March, 2020.

LOCHOWICZ & VENEMA LLP

By: //s/ Bradley J. Lochowicz
Bradley J. Lochowicz
State Bar No. 1037739