STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP875-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RYAN M. MUTH,

Defendant-Appellant.

ON APPEAL FROM A RESTITUTION ORDER ENTERED IN WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE TODD K. MARTENS, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General of Wisconsin

HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
jursshs@doj.state.wi.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUES PRESENTED

1. Did the criminal court err when it determined Defendant-Appellant Ryan M. Muth failed to establish what special damages sought as restitution by the deceased victim's adult children were already covered by a settlement with Muth's insurance company?

The circuit court answered, "No."

This Court should answer, "No."

2. Did the court err when it awarded restitution to the deceased victim's daughters for their husbands' lost wages?

The circuit court answered, "No."

This Court should answer, "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State welcomes oral argument. Publication is warranted to clarify that restitution for lost income suffered by a victim includes marital property income.

INTRODUCTION

This Court should affirm the circuit court's restitution order. Muth does not challenge the restitution ordered to the deceased victim's brother. He challenges the restitution ordered to the victim's children in whole and in part.

Importantly, he does not challenge the court's calculations of restitution amounts; he further raises no challenge to the nexus between the restitution sought and his crime. He also makes no argument that the types of special damages ordered as restitution are a type not recoverable under the restitution statute.

Instead, he first argues the court erred in awarding the victim's children restitution because they signed a settlement agreement with Muth's insurance company. This argument fails because, pursuant to *State v. Walters*, Muth had the burden to prove what portion, if any, of the civil settlement covered the particular special damages sought as restitution. Because he failed to meet this burden, the circuit court correctly determined it had an obligation to impose restitution without offset.

Muth also argues the restitution statute does not permit the deceased victim's daughters to recover the lost wages of their husbands resulting from his crime. Muth frames the question as whether the deceased victim's sons-in-law are "victims" under the restitution statute. Because the deceased victim's daughters are unquestionably "victims" under the restitution statute, the proper question is instead whether income lost by their husbands is income lost to them under the restitution statute. Our marital property laws tell us the answer is yes. This Court should therefore affirm.

STATEMENT OF THE CASE

Muth killed Tammy Kempf when he drove drunk and crashed into her car. (R. 1.) He pled no contest to one count of homicide by intoxicated use of a vehicle with one or more prior operating-while-intoxicated offenses. (R. 9; 76.) The court dismissed and read in related charges. (R. 76:12.)

The court sentenced Muth to 13 years of initial confinement followed by 13 years of extended supervision. (R. 33, A-App. A.) The sentencing transcript is not included in the record on appeal. The judgment of conviction entered after sentencing, however, listed restitution in an amount of $42,877.47, and noted the court scheduled a restitution hearing. (R. 33:2, A-App. A at 2.)

The judgment of conviction also ordered that the bond previously posted—a $25,000 cash bond—would be applied to restitution. (R. 33:2, A-App. A at 2; 76:14 (noting bond amount).)

Prior to the restitution hearing, defense counsel submitted a letter arguing that (1) the restitution claims of Kempf's children (all adults) had already been satisfied by a $100,000 settlement with Progressive Insurance, Muth's insurance company; (2) Kempf's in-laws were not "victims" for purposes of restitution; and (3) the defense needed to see documentation concerning restitution requested by Kempf's brother, S.F. (R. 46:1–2.)

Attached to the letter was a document titled "claim information" from Progressive to Mr. Muth noting that Kempf's children "accepted the $100,000 offer we had extended" "for a full and final release of you and our company." (R. 46:3, 81:1, A-App. D at 2.)

Defense counsel also attached a one-page document titled "Full Release of All Claims with Indemnity," signed by Kempf's daughters, H.M. and K.M, and son, R.K. (R. 46:4, 81:2, A-App. D at 1.) It stated that, in exchange for the consideration of the $100,000, Kempf's children agreed to "forever discharge Ryan Muth and Progressive Artisan & Truckers Casualty Insurance Company" "from any and all claims, actions, causes of actions, demands, rights, damages, costs, loss of wages, expenses, hospital and medical expenses, accrued or unaccrued claims for loss of consortium, loss of support or affection, loss of society and companionship" resulting from the car crash. (R. 46:4, 81:2, A-App. D at 1.)

At the restitution hearing, Muth's attorney explained he would not agree to pay restitution to Kempf's children (H.M., K.M., and R.K) because of the settlement with Progressive Insurance. (R. 77:8, R-App. 124.) The defense

argued this settlement extended to the spouses of Kempf's children—the "marital property interests." (R. 77:8, R-App. 124.)

The court took testimony from Kempf's brother and children about the restitution sought. (R. 77:16–34, R-App. 132–50.)

The defense agreed to most of the restitution sought by Kempf's brother, S.F.—$2,549. (R:77:21–22, R-App. 137–38.) The defense did not agree to pay restitution for his requested lost wages. (R. 77:21–22, R-App. 137–38.) S.F. testified he suffered a total of $5,852 in lost wages from this matter. (R. 77:16–21, R-App. 132–37.)

Kempf's children testified they split certain costs related to their mother's death among the three of them: canceling their mother's cell phone contract ($70 each), outstanding payments their mother owed to an attorney (between $700–800 each),[1] funeral expenses ($5,820 each), a storage unit ($150 each), and postage related to the funeral ($40 each). They confirmed they each received one-third of the $100,000 settlement. (R. 77:28, 31, 33, R-App. 144, 147, 149.)

H.M., Kempf's daughter, testified she believed the Progressive Insurance settlement "was towards [her mother's] life." (R. 77:24, R-App. 140.) Beyond the costs split with her siblings, she also requested restitution for mileage ($696.50), child care during the funeral and court dates ($720.50), and lost wages. (R. 77:25–26, R-App. 141–42.)

H.M. requested $1,600 for her own lost wages and $2,600 for her husband's lost wages "to be taking care of

---

[1] H.M. testified she paid $783.41, K.M. testified she paid $783, and R.K. testified he paid $733.41. (R. 77: 25, 28–32, R-App. 141, 144–48.)

things with the funeral or court hearings." (R. 77:25–27, R-App. 141–43.) She testified she missed 16 days of work due to this case, and her job involved working four-hour shifts at $25 per hour. (R. 77:26–27, R-App. 142–43.) She explained her husband lost 13 days of work, and his job involved working eight-hour shifts at $25 per hour. (R. 77:26–27, R-App. 142–43.)

Beyond the costs split with her siblings, K.M. sought restitution for mileage ($230), her daughter's missed private school ($76 total for the four days she missed), a babysitter ($40), and her husband's lost wages. (R. 77:29–30, R-App. 145–46.) K.M. explained she does not work outside the home. (R. 77:11, R-App. 127.) She testified her husband missed 54 hours of work to fulfill obligations related to her mother's death, and his wage is $120 per hour—a total of $6480. (R. 77:29–30, R-App. 145–46.)

Beyond the costs split with his sisters, R.K. sought mileage ($677) and lost wages for time spent at court hearings. (R. 77:32–33, R-App. 148–49.) He testified he missed five days of work with 12-hour shifts at $20.16 per hour, for a total of $1,209.60. (R. 77:32–33, R-App. 148–49.)

R.M., H.M.'s husband, stated he was the main contact with Progressive Insurance, and he believed the settlement "was towards any civil suit," not "the state criminal case." (R. 77:34, R-App. 150.)

The court found the victims met their burden to prove the losses incurred, and it imposed the requested restitution, totaling $43,270.42: $8,401 to S.F., $12,480.41 to H.M., $13,689 to K.M., and $8,700.01 to R.K. (R. 77:39, R-App. 155; 48:2, A-App. B at 2.)

The court noted that restitution ordered by a court in a criminal case does not limit a victim's right to sue in a civil action and that any restitution imposed may be offset against a civil judgment. (R. 77:41–43, R-App. 157–59.) The

court allowed the defense time to finalize its position on whether the court was "required to hold a separate hearing" concerning the "setoff provision" of the restitution statute. (R. 77:44–45, R-App. 160–61.)

The defense filed a written objection to the restitution order, arguing that the Progressive Insurance settlement precluded the restitution ordered to Kempf's children because the language of the settlement was "clear and unambiguous." (R. 49:3–6.) The defense also argued the court improperly imposed restitution for the lost wages of Kempf's sons-in-law because they were not "victims." (R. 49:6–7.) The defense took no issue with the restitution ordered to Kempf's brother, S.F. (R. 49:7.)

The State filed written responses. (R. 50; 51; 56.) As to the Progressive Insurance settlement, the State asserted the restitution order must stand unless Muth proved the restitution would result in a double recovery. (R. 56:1–2.) As to the restitution for lost wages of Kempf's sons-in-law, the State noted "Wisconsin is a marital property state." (R. 51:1.)

H.M., one of Kempf's daughters, also submitted her receipt of payment for the insurance settlement, noting the insurance company described it as a "[f]ull and [f]inal [s]ettlement of all [b]odily [i]njury [c]laims." (R. 52:2.)

The circuit court issued an oral ruling upholding its restitution order. (R. 78, R-App. 101–16.) It found the Progressive Insurance release to be "quite broad"—"a release for both special damages and general damages." (R. 78:5, R-App. 105.) It explained the restitution statute only allowed for special damages. (R. 78:5, R-App. 105.) It acknowledged crime victims cannot recover the same damages twice. (R. 78:6, R-App. 106.) At the same time, it stressed the restitution statute served two purposes: to "make victims of crimes whole" and the "punishment and rehabilitation" of the defendant. (R. 78:7, R-App. 107.)

The court concluded Muth failed to meet the burden to prove offset: "although the Defendant did articulate his legal theories, the Defendant did not point to any specific facts from which the Court could have exercised its discretion to adjust the amount downward." (R. 78:11, R-App. 111.) The court found the victims "did sustain both special and general damages" and concluded it had not been presented with any evidence "that particular amounts" of the $100,000 settlement "were for general damages and other specific amounts were for special damages." (R. 78:12, R-App. 112.)

The court also rejected Muth's argument that Kempf's sons-in-law were not "victims." (R. 78:13–14, R-App. 113–14.) It concluded Muth "interprets the statutory definition of 'victim' too narrowly." (R. 78:13, R-App. 113.) It noted Wisconsin is a marital property state and held that "[l]oss of wages to the husband is a loss of a marital asset. If it damages him, it damages her." (R. 78:13, R-App. 113.) It entered a written order enforcing its restitution order. (R. 60.)

Muth appeals.

STANDARD OF REVIEW

This Court independently determines whether the circuit court had authority to order restitution, given a particular set of facts. *State v. Walters*, 224 Wis. 2d 897, 901, 591 N.W.2d 874 (Ct. App. 1999).

If the court had authority to order restitution, this Court reviews the terms of the restitution order for an erroneous exercise of discretion. *Walters*, 224 Wis. 2d at 901. Thus, the determination of the amount of restitution, including "whether a victim's claim should be offset or reduced for any reason," is reviewed under the erroneous exercise of discretion standard. *State v. Longmire*, 2004 WI App 90, ¶ 16, 272 Wis. 2d 759, 681 N.W.2d 534.

ARGUMENT

I. The circuit court properly imposed restitution for the special damages incurred by the deceased victim's children.

A. Relevant law

Wisconsin Stat. § 973.20 *requires* a sentencing court to order restitution to a victim or a victim's estate unless the court "finds substantial reason not to do so." Wis. Stat. § 973.20(1r). "[R]estitution serves the purposes of punishment and rehabilitation of the defendant, while seeking to make the victim of criminal acts whole in regard to the special damages sustained." *Walters*, 224 Wis. 2d at 904.

A restitution order may require the defendant to 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." Wis. Stat. § 973.20(5)(a). Special damages means any "readily ascertainable pecuniary expenditure paid out because of the crime." *Longmire*, 272 Wis. 2d 759, ¶ 14 (citation omitted). General damages cover damages related to "pain and suffering, anguish, or humiliation." *Id.*

"Restitution ordered under [section 973.20] does not limit or impair the right of a victim to sue and recover damages from the defendant in a civil action." Wis. Stat. § 973.20(8).

Additionally, criminal restitution paid may be offset against a civil action: "Any restitution made by payment or community service shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution." Wis. Stat. § 973.20(8).

The statute also explains the "court trying the *civil* action shall hold a separate hearing to determine the validity and amount of any setoff asserted by the defendant." Wis. Stat. § 973.20(8) (emphasis added).

At a criminal restitution hearing, the defendant may assert any defense he "could raise in a civil action for the loss sought to be compensated." Wis. Stat. § 973.20(14)(b).

Generally, "[a]ccord and satisfaction is a complete defense to an action to enforce a claim." *Walters*, 224 Wis. 2d at 904. Nevertheless, because a crime victim has no "independent claim to restitution which he or she can release and because civil defenses cannot be raised in a way which will prevent a court from considering whether restitution should be ordered . . . the defense of accord and satisfaction does not prevent the circuit court from ordering restitution." *Id.* at 904–05.

This Court reached this conclusion in part because "restitution in criminal cases is not a claim which the defendant owns, as a civil claim is. It is a remedy that belongs to the State." *Walters*, 224 Wis. 2d at 904. Civil settlements promote different policy concerns than those present in criminal restitution. *Id.* Given these differences, "civil defenses which could be used as a complete bar to a subsequent civil action do not preclude a restitution order in a criminal proceeding." *Id.*

Payments made pursuant to a civil action may, however, "have a role in the court's consideration of how much, if any, restitution is appropriate." *Walters*, 224 Wis. 2d at 905.

Importantly, the defendant has the burden of "proving facts sufficient to prevail" on a setoff defense. *Walters*, 224 Wis. 2d at 908; *see also Herr v. Lanaghan*, 2006 WI App 29, ¶ 13, 289 Wis. 2d 400, 710 N.W.2d 496 (explaining that section 973.20(8) "places the burden on the defendant to

establish that the outstanding restitution order has been included in the calculation of any civil settlement") (citation omitted).

B. Muth failed to prove what, if any, portion of the insurance settlement covered the special damages imposed as restitution.

Pursuant to *Walters*, the victim's children's civil settlement with Muth's insurance company did not preclude the criminal court from imposing restitution. *Walters*, 224 Wis. 2d at 904. On the contrary, the criminal court had an obligation to impose restitution unless Muth proved sufficient facts to demonstrate that imposing restitution would result in a double recovery. Wis. Stat. § 973.20; *Walters*, 224 Wis. 2d at 908; *Huml v. Vlazny*, 2006 WI 87, ¶ 37, 293 Wis. 2d 169, 716 N.W.2d 807 ("[o]nly if a circuit court first finds that enforcement of the restitution order would result in double recovery for the victim can a settlement agreement affect a circuit court's authority to enter or enforce a restitution order . . . .").

The determinative question is therefore whether the circuit court erred by concluding Muth failed to meet his burden to prove that the particular amounts of restitution sought had already been paid by the insurance settlement. The circuit court correctly concluded he did not meet this burden.

As the circuit court found, (1) the Progressive Insurance settlement covered both special and general damages; (2) the victims sustained both special and general damages; and (3) Muth failed to present any evidence to establish what portions of the $100,000 accounted for special damages versus general damages. (R. 78:5–12, R-App. 105–12.)

Indeed, as the court noted, the insurance release was "quite broad." (R. 78:5, R-App. 105.) What portion of the

$100,000 was meant to cover pain and suffering? We do not know. What portion of the $100,000 was meant to cover funeral expenses? Lost wages? We do not know.

Because Muth failed to present evidence to establish what portions of that settlement overlapped with the special damages sought as restitution, the court properly concluded Muth had not demonstrated restitution would result in a double recovery for the victim's children. (*See* R. 78:11–12, R-App. 111–12.)

Muth's entire argument rests on the idea that because the insurance settlement indicated a "full release," "there has been an accord and satisfaction"—i.e., because it was a "full release," it subsumed *all* financial loss suffered by Kempf's children from the accident, including in the context of criminal restitution. (Muth's Br. 6–9.) Muth's argument parallels the argument this Court rejected in *Walters*.

Prior to the restitution hearing, Walters's insurance company paid the victim a $25,000 settlement "in exchange for a release of 'all claims and damages'" resulting from a drunk-driving car crash. *Walters*, 224 Wis. 2d at 900. Walters argued the insurance settlement constituted "an accord and satisfaction" and thus a "complete defense to restitution." *Id.* at 901. If not, Walters argued she was entitled to a setoff of $25,000 against the restitution. *Id.*

This Court first held that Walters's claim of "an accord and satisfaction" did not prevent the circuit court from imposing the restitution. *Walters*, 224 Wis. 2d at 904–05.

This Court then affirmed the circuit court's reasoning "that because the testimony had established general damages of an indeterminate amount, it would be unfair to make a setoff of the $25,000 settlement entirely against [the victim's] special damages." *Walters*, 224 Wis. 2d at 908.

Because the record showed the victim "suffered both general and special damages," "Walters had the burden of

proving *what portion* of the $25,000 payment was made for special damages." *Walters*, 224 Wis. 2d at 908–09 (emphasis added). As Walters "provided no such proof," this Court held that "the circuit court had no choice but to conclude that none of the payment should be applied against special damages." *Id.* at 909.

The same conclusions are true here. As in *Walters*, Muth's insurance company's settlement did not present a complete bar to criminal restitution. As in *Walters*, the record shows Kempf's children suffered both general and special damages. As in *Walters*, Muth provided no proof of "what portion" of the insurance settlement covered special damages. Therefore, Muth, like Walters, did not meet his burden to offset restitution.

Muth attempts to distinguish his case from *Walters* because, he argues, the language of the civil settlement release in *Walters* was "vague," and the release here was "quite specific stating, '[l]ost wages' and 'expenses.'" (Muth's Br. 7–8.) Insofar as Muth draws any real distinction from the inclusion of those two additional broad terms, it is a distinction without a difference. The fact that the release here mentions "lost wages" and "expenses" does not mean he proved "what portion" of the civil settlement applied to special damages. *See Walters*, 224 Wis. 2d at 908–09. Without that proof, the circuit court correctly imposed restitution under *Walters*.

Muth asserts the circuit court erroneously held he failed to prove "the intent of the parties" in the release; he argues that because the terms of the release were "unambiguous," the court's "attempt to determine" intent should have ended with the "four corners of the contract." (Muth's Br. 8.) Thus, he argues, by holding Muth failed to meet his burden, the court faulted him for "failing to elicit evidence that would have been inadmissible." (Muth's Br. 8–9.)

This argument misunderstands the circuit court's holding and again overlooks *Walters*. The circuit court did not hold Muth failed to prove the "intent" of the parties; the court concluded Muth failed to prove *what portion* of the settlement covered special damages as opposed to general damages. (R. 78:5–12, R-App. 105–12.)

Consider his argument applied to the facts of *Walters*: because the settlement unambiguously covered "all claims and damages," under Muth's theory, the circuit court there improperly held the defendant failed to prove offset. *See Walters*, 224 Wis. 2d at 900. This Court, however, did not so hold. Instead, it affirmed the circuit court's imposition of restitution because the defendant failed to prove "what portion" of the settlement "was made for special damages." *Id.* at 908–09. This Court should do the same here.

Muth's arguments also ignore the fundamental differences in purpose between civil settlements and criminal restitution. Criminal restitution serves not only to make victims whole but also to punish and rehabilitate the defendant. *Walters*, 224 Wis. 2d at 904. So, for example, though the court did not do so here, it bears mention that a court may order a criminal defendant to pay restitution to "reimburse any insurer" "who has compensated a victim for a loss" otherwise compensable as restitution. Wis. Stat. § 973.20(5)(d).

The distinction between a civil settlement and *criminal* restitution is also where Muth's heavy reliance on *Huml* falls short. (Muth's Br. 6–8 (citing *Huml,* 293 Wis. 2d 169).) *Huml* confronted a distinctly different question: may a civil settlement preclude enforcement of a restitution order once a defendant completes a probationary sentence and the criminal restitution order converts to a *civil* judgment? *Huml*, 293 Wis. 2d 169, ¶ 5.

The Wisconsin Supreme Court stressed this question stood apart from *Walters* and *Herr* (involving the interplay between a *civil* settlement and *criminal* restitution) because once a criminal defendant completes a probationary sentence and the criminal restitution converts to a civil judgment, "only the goal of compensating the victim remains." *Huml*, 293 Wis. 2d 169, ¶¶ 42–44.

The court therefore held that once a defendant completes probation and the restitution converts to a civil judgment, a settlement agreement may potentially preclude enforcement of the judgment; a civil settlement could not, however, affect a restitution order while a defendant remained on probation unless the court finds it would result in a double recovery. *Huml*, 293 Wis. 2d 169, ¶ 5.

The circuit court here imposed criminal restitution as a condition of Muth's 26-year criminal sentence. (R. 48; 63, A-App. C.) *Huml*'s analysis of civil judgment against civil judgment does not assist Muth's arguments; instead, *Huml* reaffirmed this Court's holding in *Walters* that a criminal court should not offset restitution unless the defendant presents the specific amounts necessary to prove double recovery. *Huml*, 293 Wis. 2d 169, ¶ 37.

If Muth believes specific portions of restitution he pays and the civil insurance settlement overlap, the restitution statute offers recourse in civil court. *See* Wis. Stat. § 973.20(8). The criminal court, however, properly concluded that because Muth could not prove what portions overlapped, it should order the special damages as restitution.

II. The circuit court had authority to order restitution to the deceased victim's daughters for their husbands' lost income.

A. Relevant law

Wisconsin Stat. § 973.20 provides that when imposing sentence, "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 or, if the victim is deceased to his or her estate*, unless the court finds substantial reason not to do so and states the reason on the record." Wis. Stat. § 973.10(1r) (emphasis added).

In addition to "all special damages" recoverable in a civil action, a court may also order the defendant to pay "an amount equal to the *income lost* . . . by the person against whom a crime considered at sentencing was committed resulting from the filing of charges or cooperating in the investigation and prosecution of the crime." Wis. Stat. § 973.20(5)(b) (emphasis added).

The restitution statute does not define the term "victim." *See* Wis. Stat. § 973.20. Courts, however, liberally construe the restitution statute to allow victims to recover losses. *State v. Anderson*, 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997). The restitution statute "reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." *State v. Queever*, 2016 WI App 87, ¶ 20, 372 Wis. 2d 388, 887 N.W. 2d 912 (citation omitted).

In *State v. Gribble*, this Court confronted a question of who constituted a "victim" under the restitution statute. 2001 WI App 227, 248 Wis. 2d 409, 636 N.W.2d 488. The defendant caused the death of an infant, and the circuit court imposed restitution for counseling for both the infant's mother and aunt. *Id.* ¶ 67. The defendant argued neither

were "victims" under the statute. *Id.* This Court concluded the infant's mother was a "victim," but the aunt was not. *Id.* ¶¶ 75–76.

In so doing, this Court addressed the lack of definition of "victim" in the statute. *Gribble*, 248 Wis. 2d 409, ¶¶ 68–74. It noted "victim" could reasonably be interpreted to be only the infant, any person who suffers psychological harm, or the definition provided in the "related statute" of section 950.02(4)(a). *Id.* ¶ 70. This Court concluded "victim" is "most reasonably interpreted" using the definition set forth in section 950.02(4)(a). *Id.* ¶ 71.

Wisconsin Stat. § 950.02(4)(a) explains that if the person against whom the crime was committed is deceased, "victim" means "any of the following:" "(a) A family member of the person who is deceased. (b) A person who resided with the person who is deceased." The statute defines "family member" as a "spouse, minor child, adult child, sibling, parent, or legal guardian." Wis. Stat. § 950.02(3).

When adopting this definition in *Gribble*, this Court considered legislative history. *Gribble*, 248 Wis. 2d 409, ¶ 71. It explained that the Legislature in the late 1990s expanded the definition of "victim," and the court reasoned that its doing so "at the same time that it added the reference [in the victim's rights statute] to restitution under § 973.20" indicated it intended everyone included as a "victim" under section 950.02(4)(a) would have the right to restitution. *Id.*

This Court rejected a narrower interpretation proposed by the defendant and broader definition proposed by the State. *Gribble*, 248 Wis. 2d 409, ¶¶ 74–76. It noted the State did not offer "any reasonable way to limit the persons who would be included in a broader category." *Id.* ¶ 76.

Shortly after *Gribble*, this Court again confronted the definition of "victim" for restitution purposes in *State v.*

Johnson, 2002 WI App 166, 256 Wis. 2d 871, 649 N.W.2d 284. Johnson was convicted of false imprisonment of teenage girls. *Id.* ¶ 2. The court ordered Johnson to pay restitution for one girl's stepfather's lost wages. *Id.* ¶ 6.

Johnson argued the victim's stepfather was not a "victim" under the restitution statute because he is "not a natural parent, a guardian or legal custodian of J.M.K." *Johnson*, 256 Wis. 2d 871, ¶¶ 15, 18. This Court agreed with Johnson. *Id.* ¶ 19.

In so doing, this Court stressed that, where the Legislature in other statutes meant to include both natural and stepparents, "it clearly did so by listing both parents and stepparents." *Johnson*, 256 Wis. 2d 871, ¶ 19. This Court "identified *no* occasions where the [L]egislature has indicated directly or indirectly that it meant 'parent' to include both natural parents and stepparents." *Id.* Thus, this Court concluded the Legislature did not intend to include stepparents in the definition of "victim" set forth in section 950.02(4)(a)2. *Id.*; *see also* Wis. Stat. § 950.02(4)(a)2 (if the person against whom the crime was committed is a child, a "victim" includes "a parent, guardian or legal custodian of the child").

This Court rejected the circuit court's conclusion that the stepfather's lost wages "were tantamount" to the victim's due to the "operation of Wisconsin's marital property laws." *Johnson*, 256 Wis. 2d 871, ¶ 23. It rejected this argument because (1) the State did not develop that argument on appeal and (2) "there is no language in the restitution statute or in Wis. Stat. § 950.02(4)(a) suggesting that restitution be permitted through such an indirect route . . . ." *Id.*

B. The lost income of the deceased victim's sons-in-law is the lost income of the deceased victim's daughters.

No question exists that H.M. and K.M., Kempf's adult daughters, are "victims" for restitution purposes. *See* Wis. Stat. § 950.02(3)–(4)(a). Beyond his argument about the insurance settlement, Muth does not otherwise argue that H.M. was unable to recover lost wages from her job, nor does he make any argument that the lost wages are somehow not recoverable as restitution. He simply challenges the court's authority to order restitution for the lost wages of H.M. and K.M.'s husbands.

Muth frames the question as whether in-laws are "victims" under the statute. The State looks at it differently: the question is whether the lost wages of the victims' husbands constitutes "income lost" by the victims. *See* Wis. Stat. § 973.20(5)(b).

Indeed, section 973.20(5)(b) tells us that a court may require a defendant to pay "an amount equal to the income lost" "by the person against whom a crime considered at sentencing was committed." Muth does not dispute that H.M. and K.M. are victims of his crime.

So, is income lost by H.M. and K.M.'s husband's income lost by H.M. and K.M.?

The answer is yes. This Court rejected the State's undeveloped marital property argument in *Johnson* in 2002. Let the State develop it here:

Wisconsin Stat. § 766.31 specifically addresses the "classification of income" under Wisconsin's marital property laws: with certain limited exceptions, "income earned or accrued by a spouse or attributable to property of a spouse during the marriage and after the determination date is marital property." Wis. Stat. § 766.31(4). Marital property means that "[e]ach spouse has a present undivided one-half

interest in each item of marital property." Wis. Stat. § 766.31(3). Our marital property laws also establish a presumption that all property of spouses is marital property. Wis. Stat. § 766.31(2).

Wisconsin's marital property laws took effect in 1986. 1983 Wis. Act 186; 1985 Wis. Act 29; 1985 Wis. Act 37. One year later, in 1987, the Legislature created the section 973.20 statutory scheme for the imposition of restitution in criminal cases—including the provision permitting a court to order the defendant to pay "an amount equal to the income lost" by a victim. 1987 Wis. Act 398, § 43.

In a community property system, the focus is not on title, it is on shared ownership: "The rights of a wife in a community property system do not stem from title, but from a legally imposed undivided shared *ownership* interest in the couple's community estate." Caroline Bermeo Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It and Why Community Property Principles Benefit Women*, 11 U. Md. L.J. Race, Relig., Gender & Class 1, 11 (2011).

Or, as the circuit court aptly put it here, "[i]f it damages him, it damages her." (R. 78:13, R-App. 113.) H.M. and K.M. testified at the hearing about restitution *they* sought for actual losses to *them*—income that, by law, belongs to *them* just as much as it belongs to their husbands.

If this is not "income lost" to H.M. and K.M., consider the reverse: Should H.M., for example, not be able to claim lost wages from her work because those wages really belong to her husband? Should she only be able to claim half because her husband also has an undivided interest in half of her wages?

Consider K.M., who testified that her husband is the only spouse who works outside the home. (R. 77:11, R-App. 127.) Her husband's lost income—her *family's* only income—

is indeed a loss to *her*. If it were K.M. who was the sole income earner in her household, and not her husband, Muth would not be challenging her request for restitution.

H.M.'s husband's lost income is just as much a loss to H.M., as she and her husband earn income that belongs to both of them. (*See* R. 77:25, R-App. 141.) That both partners have equal ownership to income earned in the marriage—regardless of the division of labor—is the central idea behind the concept of marital property.

Moreover, this fundamental principle exists only between spouses, not other family members. *See* Wis. Stat. § 766.31. Thus, this Court's concern in *Gribble*—that there would not be "any reasonable way to limit" who is included in the category for restitution—is not present here. *See Gribble*, 248 Wis. 2d 409, ¶ 76.

Importantly, when concluding that a child victim's stepfather was not a "victim" in *Johnson*, this Court stressed it could find no occasions whatsoever where the Legislature intended the word "parent" to include both natural parents and stepparents. *Johnson*, 256 Wis. 2d 871, ¶ 19.

The same cannot be said for the Legislature's intention with regard to the "income" of spouses. On the contrary, our law directly provides and presumes that "income" accrued by a spouse belongs to *both* spouses. Wis. Stat. § 766.31(4).

Indeed, when arguing that the Progressive Insurance settlement—signed only by Kempf's three children (not spouses)—prohibited the imposition of restitution here, Muth himself asserts the settlement included "marital property claims for lost wages." (Muth's Br. 6.)

When this Court searched for a definition of "victim" for restitution purposes in *Gribble*, it acknowledged that it had to choose from one of multiple reasonable options. *Gribble*, 248 Wis. 2d 409, ¶ 71. Ultimately, this Court need not get bogged down in an assessment of whether a son-in-

law is a "victim" for purposes of restitution, because the restitution statute tells us H.M. and K.M. are entitled to their "income lost." The restitution statute itself, combined with section 766.31—which tells us that "income earned" during a marriage belongs to *both* spouses—answers the question.

H.M. and K.M.'s husband's lost wages is "income" H.M. and K.M. "lost," and the court properly ordered restitution.

CONCLUSION

This Court should affirm the circuit court's restitution order.

Dated this 27th day of August, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
jursshs@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,648 words.

Dated this 27th day of August, 2018.

_____
HANNAH S. JURSS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 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 27th day of August, 2018.

_____
HANNAH S. JURSS
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Ryan M. Muth
Case No. 2018AP875-CR

APPENDIX 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 Wis. Stat. § 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 one or more initials or other appropriate pseudonym or designation, 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 27th day of August, 2018.

_____

HANNAH S. JURSS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 27th day of August, 2018.

_____
HANNAH S. JURSS
Assistant Attorney General