STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2021AP1841-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MARK J. GAHART,

Defendant-Respondent.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING RESTITUTION ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE JASON A. ROSSELL, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

Precedent prescribes a court to construe the restitution statute broadly and liberally to allow a victim to recover for a loss from a defendant's crime. In furtherance of this construction, courts don't simply look to the criminal elements or a penalty enhancer to determine whether a defendant victimized another. Restitution cannot be summarily dismissed by characterizing a defendant's conduct as a victimless crime.

Here, the State charged Mark Gahart with operating his vehicle under the influence with a minor passenger present. He drove impaired with his minor daughter in the vehicle. After dropping his daughter off with her mother, he continued to drive under the influence and crashed into another vehicle, injuring its driver. Gahart fled the scene and tried to conceal his vehicle. But law enforcement found him and the State charged him for his criminal conduct.

The minor passenger's mother sought restitution as a crime victim. The circuit court denied the restitution request, reasoning that it was not legally authorized to order restitution. Specifically, the court thought driving impaired with a minor passenger was a victimless crime, so there was no victim to compensate under the restitution statute.

This Court should conclude operating under the influence with a minor passenger is not a victimless crime. The Legislature amended the statutes to criminalize this conduct. The presence of a minor passenger is a specific element a jury must find to convict. The passenger is a victim and, as a minor, the passenger's nonoffending parent is a victim. As victims, the minor and nonoffending parent have constitutional and statutory rights, including the right to restitution. This Court should reverse the circuit court.

STATEMENT OF THE ISSUE

Did the circuit court make an incorrect legal determination when it concluded that the crime of operating a vehicle under the influence with a minor passenger had no victim for restitution purposes?

This Court should conclude the circuit court erred in its legal conclusion. The circuit court thought the minor passenger was not a "victim," within the legal meaning of that term. The circuit court concluded that, if there was no victim, then there could be no restitution.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests publication and does not request oral argument. Publication is appropriate because a decision in this case should enunciate a new rule of law in areas of substantial and continuing public interest. Wis. Stat. § (Rule) 809.23(1)(a)1., 5. Oral argument is unnecessary because the briefs should fully present the issues on appeal and fully develop the theories and legal authorities advanced by each side. Wis. Stat. § (Rule) 809.22(2)(b).

STATEMENT OF THE CASE

Nature of the case. The State appeals from a judgment of conviction and order that denied restitution. (R. 69.) In conjunction with Gahart's conviction following his guilty plea to operating a vehicle under the influence with a minor passenger in the vehicle (R. 68:12), the minor passenger's mother had requested restitution (R. 48:4, 10, 16; 73:2). The circuit court orally denied the request, concluding the minor passenger was not legally a "victim," as that term is defined in Wisconsin. (R. 48:18–21.) The court then entered a written order denying restitution (R. 67), awarding no restitution in the judgment of conviction (R. 62:1). The State filed a notice of appeal. (R. 69.)

The crimes. The State charged Gahart with several impaired driving crimes, including a misdemeanor operating a motor vehicle under the influence with a minor passenger under 16 years of age in the vehicle. (R. 20:3.) The State also charged Gahart with a felony hit and run with injury, arising out of the same course of criminal conduct. (R. 20:1.)

The criminal complaint explained that a sheriff's deputy responded to the scene of a traffic collision. (R. 2:2.) The deputy "observed a red pickup truck with significant damage to the rear of the vehicle." (R. 2:2.) The driver of the pickup truck was on scene, bleeding and receiving treatment for multiple cuts. (R. 2: 2.) The driver told the deputy that a black SUV struck the rear of his vehicle. (R. 2:2.) The black SUV had fled the scene. (R. 2:2.)

A sheriff's deputy identified Gahart as the driver of the black SUV who had fled the scene. (R. 2:2.) Gahart was identified because his bumper and license plate fell from his vehicle during the collision and remained on scene. (R. 2:2.) Deputies responded to Gahart's residence where they observed a damaged black SUV parked in a heavily wooded area. (R. 2:3.) Parking the vehicle in the secluded area required driving the vehicle away from the driveway, through a grass yard, and among small trees and brush. (R. 2:3.) Upon later contact, Gahart admitted to having been the driver. (R. 2:3.)

Less than an hour before the collision, Gahart had driven with a minor passenger in the vehicle. (R. 19.) The minor passenger was Gahart's daughter. (R. 91:6.) The minor passenger's mother told the court Gahart "placed her in a vehicle and scared her with his erratic driving from Burlington to Kenosha." (R. 91:3.) She added that the daughter asked Gahart to slow down, but he "silenced her" as he followed other vehicles closely and attempted to "pass everybody." (R. 91:3–4.) Gahart dropped his daughter off at home about 20 minutes before his collision with the other

vehicle. (R. 91:4.) The daughter was under 16 years old when she was Gahart's passenger in his vehicle. (R. 20:3.)

The investigation revealed that Gahart had a prohibited alcohol concentration when he drove and later crashed his vehicle. (R. 2:3; 20:2–3.) The information identified a 0.13 blood alcohol level. (R. 20:2.) Gahart had performed poorly on standard field sobriety tests. (R. 2:3–4.) He had a prior conviction the previous year for refusing a chemical test, a countable prior offense under the graduated penalty structure for impaired driving crimes. (R. 2:4.)

Guilty pleas. Gahart pleaded guilty to one felony and one misdemeanor. (R. 68:12.) He pleaded guilty to the felony hit and run with injury (R. 68:12), for his collision with the red pickup truck, injury to its driver, and fleeing the scene (R. 2:2–3). Gahart also pleaded guilty to operating under the influence with a minor passenger (R. 68:12), for having driven in an impaired state with his minor daughter in the vehicle less than an hour before the collision (R. 19; 20:3). Before accepting this guilty plea, the court explained the three elements that the State would have to prove for the misdemeanor crime: (1) "you operated a motor vehicle on a public highway in the State," (2) "while you did so, you were under the influence of an intoxicant," and (3) "at the time of the operating, there was a child under the age of 16 as a passenger in the vehicle." (R. 68:8–9.) The court dismissed the other impaired driving crimes that arose out of the same course of criminal conduct. (R. 68:13.) The circuit court accepted the guilty pleas and found Gahart guilty. (R. 68:12–13.)

Restitution. Prior to the sentencing, the court received a request for restitution from the minor passenger's mother. (R. 48:4, 10, 16; 73:2.) The minor passenger's mother incurred expenses and fees in a family court proceeding as a result of Gahart's crimes. (R. 73:4.) The minor passenger's mother later explained Gahart had threatened to file contempt

charges against her if she withheld their child from him. (R. 91:4.) She described having "no choice but to file in family court to keep her [daughter] safe." (R. 91:4.) The minor passenger's mother sought $13,250 in restitution for expenses incurred in family court related to action taken in response to Gahart's impaired driving with her minor daughter in the vehicle. (R. 48:4–7.)

The circuit court denied restitution in an oral ruling at a hearing.[1] At the hearing, the court first considered a purely legal question regarding whether the minor passenger satisfied the legal definition of "victim." (R. 48:7.) The court thought the minor passenger was not a "victim," as that term is legally defined. (R. 48:18–20.) The court's rationale was that the presence of a minor passenger was a penalty enhancement to an operating a motor vehicle under the influence offense—not an element to a crime. (R. 48:18–19.) As to the restitution request, the court framed it as whether there was a causal nexus between the crime and requested restitution that may require testimony from witnesses. (R. 48:23.) The court was "reluctant to make any specific rulings in the areas of causal nexus because this may go up on appeal." (R. 48:21.) The court withheld judgment on the causal nexus question (R. 48:13); it didn't take any testimony from witnesses (*see generally* R. 48 (no testimony taken).) So the court's decision denying restitution was solely based on the first question regarding the definition of "victim." (R. 48:21.) The court later reduced its oral ruling to a written order denying restitution. (R. 67.)

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[1] An earlier restitution hearing took place. (R. 73.) A court commissioner presided over the earlier hearing. (R. 48:20). A circuit court judge then presided at the subsequent restitution hearing and described its review as de novo. (R. 48:2.) The dispositive restitution hearing is the second hearing, which formed the basis of the order denying restitution and judgment reflecting the same.

Sentence and judgment. The circuit court withheld sentence on the felony hit and run with injury and imposed jail and a fine on the misdemeanor operating under the influence with a minor passenger. (R. 60:1; 62:1.) Before imposing sentence, the circuit court permitted the minor passenger's mother to address the court. (R. 91:3–6.) The court stated its earlier denial of restitution had "more to do with whether or not the [victim] status applies to the restitution statute" (R. 91:5), not whether the minor passenger's mother was "afforded the opportunity to address the Court because that is one of the rights afforded to victims in the 950 statute and by the Constitution of the State of Wisconsin" (R. 91:6). The court then imposed a two-year probation term on the felony. (R. 60:1.) On the misdemeanor, the court ordered 90 days jail and a $1,018 fine plus costs and surcharges. (R. 62:1.) The judgment of conviction didn't include any restitution. (R. 62:1.)

Appeal. Upon entry of judgment and the order denying restitution, the State filed a notice of appeal. (R. 69.) This matter now is before this Court on appeal.

STANDARD OF REVIEW

"The scope of the trial court's authority to order restitution is a question of statutory interpretation." *State v. Hoseman*, 2011 WI App 88, ¶ 12, 334 Wis. 2d 415, 799 N.W.2d 479. This Court reviews de novo whether "the trial court is authorized to order restitution under a certain set of facts, and whether a claimant is a 'victim,'" as that term is legally defined in Wisconsin. *State v. Vanbeek*, 2009 WI App 37, ¶ 6, 316 Wis. 2d 527, 765 N.W.2d 834.

ARGUMENT

This Court should reverse the circuit court's denial of restitution because the minor passenger and the minor's nonoffending parent are victims with a right to restitution.

A. Constitutional and statutory interpretation principles govern this Court's review.

This appeal requires interpreting both constitutional and statutory provisions. The principles governing interpretation of the constitution versus a statute are similar (e.g. examining the plain meaning and context of words), though some differences exist (e.g. weighing framers' intent more heavily than legislative intent). To understand the similarities and differences, it's important here to present the underlying principles of each.

A court examines multiple sources to interpret a constitutional provision that include: (1) "the plain meaning of the words in the context used;" and (2) "the constitutional debates and the practices in existence at the time of the writing of the constitution."[2] *Schilling v. State Crime Victims Rts. Bd.*, 2005 WI 17, ¶ 16, 278 Wis. 2d 216, 692 N.W.2d 623

[2] A court also examines a third source: "the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption." *Schilling v. State Crime Victims Rts. Bd.*, 2005 WI 17, ¶ 16, 278 Wis. 2d 216, 692 N.W.2d 623 (quoting *Wisconsin Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 44, 270 Wis. 2d 318, 677 N.W.2d 612). But that source isn't yet available here because the relevant constitutional provision, Wis. Const. art. I, § 9m, was amended through a 2020 amendment. *See State v. Johnson*, 2020 WI App 73, ¶ 7, 394 Wis. 2d 807, 951 N.W.2d 616. The relevant statutory provisions, sections 950.02(4)(a) (defining victim) and 973.20 (providing for restitution), have not been legislatively amended since the constitutional amendment.

(quoting *Wisconsin Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 44, 270 Wis. 2d 318, 677 N.W.2d 612).

Statutory interpretation principles similarly require looking at the plain meaning of words and in the context used. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶¶ 45–46, 271 Wis. 2d 633, 681 N.W.2d 110. But, "as a general matter, legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation." *Id.* ¶ 51.

A court looks to the plain language of a provision under review with the structure and context important to interpret the provision's meaning. *Id.* ¶ 45–46. The "language is interpreted in the context in which it is used; not in isolation but as part of a whole . . . and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46. Examining a constitutional or statutory provision's purpose, scope, and context are important: "It is certainly not inconsistent with the plain-meaning rule to consider the intrinsic context in which statutory language is used; a plain-meaning interpretation cannot contravene a textually or contextually manifest statutory purpose." *Id.*, ¶ 49.

Here, this Court must interpret one constitutional provision and four statutes. The relevant constitutional provision both defines "victim" and entitles a victim "[t]o full restitution." Wis. Const. art. I, § 9m(1)(a), (2)(m). Two of the relevant statutes similarly define "victim" with a right to restitution. Wis. Stat. §§ 950.02(4)(a); 950.04(1v)(r). The other two statutes are the restitution statute and the crime of operating a vehicle under the influence with a minor passenger. Wis. Stat. §§ 346.65(2)(f); 973.20. This Court should conduct its review under the guiding constitutional and statutory principles.

B. Operating a motor vehicle under the influence with a minor passenger under 16 years of age in the vehicle is a crime.

"A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both." Wis. Stat. § 939.12. In contrast, "[c]onduct punishable only by a forfeiture is not a crime." Wis. Stat. § 939.12. So conduct punishable by a *fine* is a crime, while conduct punishable by a *forfeiture* is noncriminal. Wis. Stat. § 939.12.

In 2009 Wisconsin Act 100,[3] Wisconsin criminalized operating a motor vehicle under the influence of an intoxicant or other drug with a minor passenger under 16 years of age in the vehicle by eliminating a forfeiture penalty, replacing it with a criminal punishment.

Prior to the act, the presence of a minor passenger doubled the *forfeiture* penalty for a first-time offender: "If there was a minor passenger under 16 years of age in the motor vehicle at the time of the violation that gave rise to the conviction [of operating under the influence] under s. 346.63 (1), the applicable minimum and maximum *forfeitures* . . . for the conviction are doubled." Wis. Stat. § 346.65(2)(f) (2007–08).

After enactment, it was a crime: "If there was a minor passenger under 16 years of age in the motor vehicle at the time of the violation . . . , the person shall be *fined* not less than $350 nor more than $1,100 and *imprisoned* for not less than 5 days nor more than 6 months." 2009 Wis. Act 100, § 49 (creating Wis. Stat. § 346.65(2)(f)1.).

The Legislature was explicit in its intent to convert the forfeiture to a crime. A legislative memo stated that the act made "a first OWI-related offense a *criminal* offense if a child

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[3] 2009 Wisconsin Act 100 is available at https://docs.legis.wisconsin.gov/2009/related/acts/100.pdf.

younger than 16 years of age is present in the vehicle at the time of the offense." Wisconsin Legislative Council Act Memo[4] 1 (emphasis added). The memo provided a comparison chart that further emphasized the intent to replace the forfeiture penalty with a criminal punishment:

	[Before Enactment]	***2009 Wisconsin Act 100***
First Offense OWI (**with minor passenger**)	$300 to $600 forfeiture (civil offense—forfeiture is doubled if minor passenger).	$350 to $1,100 fine; 5 days to 6 months term of imprisonment (criminal offense).

Id. at 2.

As part of the Legislature's decision to criminalize this conduct, the act purged reference to a forfeiture penalty from the statute:

> If there was a minor passenger under 16 years of age in the motor vehicle at the time of the violation that gave rise to the conviction under s. 346.63 (1), the applicable minimum and maximum ~~forfeitures,~~ fines~~, or~~ and imprisonment under par. (am) 2. to 7. for the conviction are doubled.

2009 Wis. Act 100, § 48 (renumbering Wis. Stat. § 346.65(2)(f) to Wis. Stat. § 346.65(2)(f)2. and amending it to remove reference to a forfeiture).

Operating a motor vehicle under the influence with a minor passenger under 16 years of age in the vehicle is a crime. The State has the burden to prove beyond a reasonable doubt three elements: (1) The defendant drove or operated a motor vehicle on a highway; (2) The defendant was under the influence at the time the defendant drove or operated the

[4] The Wisconsin Legislative Council Act Memo is available at https://docs.legis.wisconsin.gov/2009/related/lcactmemo/act100.pdf.

motor vehicle; and (3) "There was a minor passenger under 16 years of age in the vehicle." Wis. JI–Criminal 2663D (2011). The jury instruction is clear that a jury must be "satisfied beyond a reasonable doubt that all three elements of this offense have been proved" to find guilt; if the jury is "not so satisfied, [it] must find the defendant not guilty." *Id*. So the presence of the minor passenger is a necessary element of the crime.

C. A crime victim has a constitutional entitlement and statutory right to restitution.

A crime victim has a constitutional entitlement and statutory right to restitution. To understand the right of restitution, it's important to begin by examining the definition of "victim" both within the constitution and statute.

The constitution and statutes define a victim to include both a minor victim and the minor's parents, except when the parent is the defendant. When a minor is victimized, the constitution includes multiple people within the definition of victim. The first victim is the minor because the constitution defines "victim" to include a "person against whom an act is committed that would constitute a crime if committed by a competent adult." Wis. Const. art. I, § 9m(1)(a)1. The second victim is the minor's nonoffending parent because the constitution includes that parent within the definition of "victim." *Id*. § 9m(1)(a)3., (b).[5] The statutes similarly define "victim" to include both the minor "against whom a crime has been committed" and the minor's nonoffending parent. Wis.

[5] The constitution excludes a nonoffending parent from the definition of "victim" when a court finds that parent would not act in the minor's best interest. Wis. Const. art. I, § 9m(1)(b). This exclusory provision is beyond the scope of the issue before this Court, so the State does not address it in this brief beyond recognizing its existence.

Stat. § 950.02(4)(a)1.; *see also* Wis. Stat. § 950.02(4)(a)2., (b). The plain language in both the constitution and statutes make clear "victim" includes both the minor and the minor's nonoffending parent.

A crime victim's constitutional entitlement and statutory right to restitution is clearly established. The constitution entitles a victim to the right of full restitution:

> (2) In order to preserve and protect victims' rights to justice and due process throughout the criminal and juvenile justice process, victims shall be entitled to . . . the following right[ ], which shall vest at the time of victimization and be protected by law in a manner no less vigorous than the protections afforded to the accused:
>
> . . .
>
> (m) To full restitution from any person who has been ordered to pay restitution to the victim and to be provided with assistance collecting restitution.

Wis. Const. art. I, § 9m(2)(m). Similarly, a victim of a crime has the statutory right to restitution as provided under a restitution statute. Wis. Stat. § 950.04(1v)(q) (citing the restitution statute in Wis. Stat. § 973.20). The statutes further provide that this right must be "honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants." Wis. Stat. § 950.01.

The restitution statute effectuates the right to restitution by requiring that a court "shall order the defendant to make full or partial restitution[6] . . . to any

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[6] The restitution statute's enactment predates the 2020 constitutional amendment. A court hasn't yet resolved whether a court may impose "partial restitution" under the statute without running afoul with the constitutional amendment that entitles a victim to "full restitution." This unresolved legal issue is beyond

victim of a crime considered at sentencing" when the court imposes its sentence or orders probation. Wis. Stat. § 973.20(1r) (footnote added).[7] A court "should construe the restitution statute broadly and liberally in order to allow victims to recover their losses as a result of a defendant's criminal conduct." *State v. Anderson*, 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997).

D. A minor passenger and the minor passenger's nonoffending parent each are crime victims with a right to restitution.

Whether a minor passenger and the minor passenger's nonoffending parent are crime victims entitled to the right of restitution requires answering three questions: (1) Is the minor passenger a victim; (2) If the minor passenger is a victim, is the minor passenger's nonoffending parent a victim; and (3) If they are victims, are they entitled to the right of restitution?

Only the first of these three questions is disputed such that the other two may be quickly answered in the affirmative. Yes, a crime victim is entitled to the right of restitution, *supra* Section C. Neither Gahart nor the circuit court suggested that the minor passenger was not entitled to the right of restitution *if* the minor passenger was a victim. (*See generally* R. 48 (focusing the argument and decision on

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the scope of the issue before this Court given the posture of the appeal and the underlying rationale of the circuit court's decision and order.

[7] The restitution statute permits a court to forgo restitution when it "finds substantial reason not to do so and states the reason on the record," such as after considering the "financial resources of the defendant" and "other factors which the court deems appropriate." Wis. Stat. § 973.20(1r), (13)(a). Whether a circuit court may forgo restitution without running afoul with the constitutional entitlement of "full restitution" is beyond the scope of the issues before this Court, *supra* n.6.

the definition of "victim"). Rather, they thought the minor passenger was not a "victim" within the legal definition. (R. 48:2–3, 20.) If the minor passenger *is* a victim, then the constitution and statute are clear: Yes, a minor victim's nonoffending parent also is a victim, *supra* Section C.[8] Assuming the minor passenger is a victim and, thus, the minor passenger's nonoffending parent is a victim, their constitutional and statutory right to restitution cannot be credibly disputed, *supra* Section C. So the dispositive question to answer is whether the minor passenger is a victim.

Yes, the minor passenger is a victim. The constitution and statute define "victim" in a substantially similar way as it pertains to the issue under review.[9] As explained previously, *supra* Section C., a "victim" is a person against whom a criminal act is or has been committed.

Courts have confirmed that the definition of "victim" is interpreted broadly; it is not limited only to those named in a charging document. *State v. Foley*, 142 Wis. 2d 331, 343, 417 N.W.2d 920 (Ct. App. 1987). In *Agosto*, this Court determined a surety who posted a defendant's bond is a victim to the defendant's subsequent crime of bail jumping. *State v. Agosto*, 2008 WI App 149, ¶ 8, 314 Wis. 2d 385, 760 N.W.2d 415. In *Vanbeek*, this court concluded a school district was a victim entitled to restitution for the salaries and benefits paid to teachers and staff during a school evacuation in response to a

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[8] The circuit court acknowledged a parent is legally within the definition of "victim" in the case of a minor. (R. 48:18 (citing Wis. Stat. § 950.02(4)(a)2.).)

[9] Any legal distinction between the constitutional and statutory definition of "victim" is beyond the scope of the issue in this appeal because neither party has argued the minor passenger is only a "victim" under one definition and not the other. This Court may reserve for another day any material difference in the definitions when that issue is squarely before the court in a future appeal.

defendant making a bomb scare at the district's high school, a crime under section 947.015. *See generally Vanbeek*, 316 Wis. 2d 527 (affirming a circuit court's restitution award). And in *Hoseman*, this court held that a homeowner was a "direct victim" entitled to restitution from a defendant convicted of conspiracy to manufacture marijuana, a drug crime in section 961, because the marijuana grow operation caused significant property damage to the house. *See generally Hoseman*, 334 Wis. 2d 415 (affirming a circuit court's restitution award). The broad and liberal interpretation of "victim" in the constitutional and statutory definitions align with this Court's similar conclusion to construe the restitution statute in the same manner. *See Anderson*, 215 Wis. 2d at 682 (broadly and liberally construing the restitution statute).

Broadly defining and liberally interpreting the meaning of "victim" has existed for decades, but it's more salient now upon passage of the 2020 constitutional amendment. In interpreting the meaning of "victim" defined in the constitution, a court looks to the framer's intent at the time of the constitutional provision's creation. *Schilling*, 278 Wis. 2d 216, ¶ 16. The constitutional amendment—commonly referred to as Marsy's Law—arose out of the underenforcement and underdevelopment of victim rights that "perpetuated ambiguity and inattention toward victims." Rebecca M. Donaldson et al., *Marsy's Law: Changes for Crime Victims?* Wis. Lawyer (Sept. 8, 2020).[10] Although Marsy's Law "does not substantially change who can claim victim status," it empowered a victim by vesting rights at the time of victimization within the definition. *Id.* Nothing in the constitutional amendment was designed to constrict the

[10] This article in Wisconsin Lawyer is available at https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?ArticleID=27930#a.

meaning of "victim," to the contrary, it was designed to "empower victims." *Id.*

The circuit court deviated from precedent and Marsy's Law by concluding, as a matter of law, a minor passenger to the crime in section 346.65(2)(f) is not a victim. The Legislature has criminalized such conduct where the minor's presence is a specific element of the crime, *supra* Section B. At the plea hearing, the circuit court understood the elements, specifically reciting each element and stating the third element required proof that, "at the time of the operating, there was a child under the age of 16 as a passenger in the vehicle." (R. 68:8–9.) But at the restitution hearing, the circuit court recharacterized the presence of a minor passenger as a penalty enhancement—not an element to a crime. (R. 48:18–19.)

Characterizing the minor passenger element as a penalty enhancer is inapposite. *See, e.g., State v. Neill*, 2020 WI 15, 390 Wis. 2d 248, 938 N.W.2d 521 (using the term enhancer to discuss the interaction among various elevated penalties). The definition of "victim" is not restricted to those identified in an element or enhancer; a victim need not even be identified within a crime in a complaint or information. *See Foley*, 142 Wis. 2d at 343 (victim is not limited to those named in a charging document). A victim may be a surety who lost a bond due to a subsequent act of bail jumping, *Agosto*, 314 Wis. 2d 385, ¶ 8, or a school district subjected to a bomb threat, *Vanbeek*, 316 Wis. 2d 527. The circuit court's ruling breaks from precedent and away from the framer's purpose and intent in creating Marsy's Law.

The circuit court erred in its restrictive interpretation, essentially concluding that it was a "victimless" crime to operate a vehicle under the influence with a minor passenger. This Court rejected such a rationale in *Hoseman*, concluding the homeowner was a victim for the crime of conspiracy to manufacture marijuana when the resulting marijuana grow

operation damaged the property. *See generally Hoseman*, 334 Wis. 2d 415 (rejecting the defendant-appellant's "victimless" crime rationale and finding the homeowner a "direct victim").

The circuit court's decision that the minor passenger and nonoffending parent are not legally identified victims has significant consequence beyond whether they are entitled to restitution; it voids *all* constitutional and statutory rights to victims of crimes. If the minor passenger and nonoffending parent fall outside the definition of "victim," they have none of the constitutional victim rights; that is, they have no right to notice of proceedings, no right to confer with the prosecutor, no right to be heard at sentencing, and no right to information about the outcome of the case. *See* Wis. Const. art. I, § 9m(2)(g), (h), (i), (o) (constitutional victim rights). Although they may retain some statutory rights as a witness, they'd lose the more robust statutory rights afforded to crime victims. *Compare* Wis. Stat. § 950.04(1v), *with* Wis. Stat. § 950.04(2w) (victim rights versus witness rights).

The circuit court may have recognized it's error by the sentencing hearing, though it took no action to remedy it. Shortly after commencing the sentencing hearing, the circuit court declared: "Just so it's clear for the record, I did not determine that she did not have have [sic] victim status. . . . So, the determination of the Court was not anything as to status, only whether or not that it applied to the restitution statute which is a completely different statute." (R. 91:5.) But the circuit court missed the mark. A victim does not have the right to be heard at sentencing, while simultaneously lacking the right to request restitution. The constitutional and statutory rights are not an à la carte enumeration. If a person is legally a victim, then the person has all the rights in Wis. Const. art. I, § 9m(2) and 950.04(1v). So the dispositive issue is whether the minor passenger is legally a victim.

Here, the minor passenger is a crime victim. When a person operates under the influence with a minor passenger,

it's an acute danger with the potential for direct harm to the minor. Courts have repeatedly recognized the harm caused by a person operating a motor vehicle under the influence of intoxicant or other drug. *See, e.g. State v. Luedtke*, 2015 WI 42, ¶ 71, 362 Wis. 2d 1, 863 N.W.2d 592 ("drivers who have restricted controlled substances in their blood are a threat to public safety"); *Lievrouw v. Roth*, 157 Wis. 2d 332, 345, 459 N.W.2d 850 (Ct. App. 1990) ("Drunk driving is a terrible scourge.") Such a danger is ever clearer and more present when the person commits the act with a minor passenger—typically in a situation as occurred here of an impaired parent driving with a minor child present. The child cannot extricate from the situation because the "lawful authority of a parent over a minor child includes the authority to direct the child's activities." *State v. Teynor*, 141 Wis. 2d 187, 200, 414 N.W.2d 76 (Ct. App. 1987).

This Court should conclude it is not a victimless crime to endanger a child by operating a motor vehicle under the influence with the child as a minor passenger in the vehicle. The circuit court was wrong to conclude otherwise. A minor passenger and the minor passenger's nonoffending parent each are crime victims; each have the constitutional and statutory rights to victims of crime that includes the right to restitution. This Court should reverse the circuit court's order.

E. This Court should remand for an evidentiary hearing on the victims' restitution request.

When a circuit court applied the wrong legal analysis, the remedy is often reversal and remand for the court to apply the proper legal standard. *See LeMere v. LeMere*, 2003 WI 67, ¶ 4, 262 Wis. 2d 426, 663 N.W.2d 789 (employing such a remedy). But a remand isn't always required because an appellate court may decide the issue itself when the record

permits. *State v. Delgado*, 223 Wis. 2d 270, 286, 588 N.W.2d 1 (1999).

Here, the proper remedy is a remand because the record is insufficient for this Court to decide restitution. The State had explained at the restitution hearing that testimony may be necessary. (R. 48:16.) The circuit court stated that it was "reticent to issue . . . any ruling as to causal nexus" between the crime and the restitution requested because it "would have to be in the position of taking testimony." (R. 48:23.) The circuit court denied restitution without taking any testimony at the restitution hearing, thereby failing to create a sufficient and complete record for this Court to review restitution. So remand is the proper remedy.

* * * * *

This Court should conclude that a circuit court has constitutional and statutory authority to award restitution to a victim for the crime of operating a motor vehicle under the influence with a minor passenger under 16 years of age in the vehicle, a crime under section 346.65(2)(f). The minor passenger is the victim of this crime and, based upon the victim's age, the minor's nonoffending parent also is a victim. This Court should conclude that a minor passenger and the minor passenger's nonoffending parent each are crime victims with a constitutional and statutory right to restitution. This Court should remand this matter for an evidentiary hearing on restitution.

CONCLUSION

This Court should reverse the circuit court's order and judgement that denied restitution. It should remand to the circuit court for further proceedings to decide restitution under the legal framework that the minor passenger and nonoffending parent are victims with a constitutional and statutory right to restitution.

Dated this 25th day of February 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,615 words.

Dated this 25th day of February 2022.

Electronically signed by:

Winn S. Collins
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 25th day of February 2022.

Electronically signed by:

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