

STATE OF WISCONSIN
COURT OF APPEALS
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 DEFENDANT - APPELLEE

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Rebecca M. Donaldson et al.,

Marsy's Law: Changes for Crime Victims?

Wis. Lawyer (Sept. 8, 2020) 20

INTRODUCTION

In this case, the Circuit Court decided in a De Novo Restitution Hearing that Operating a Motor Vehicle with a Child Under 16 Years Old in the motor vehicle, did not qualify the minor child to be a “Victim” under the Restitution Statute and Case Law.

Mr. Gahart was convicted of Operating a Motor Vehicle with a Child Under 16 Years of Age and Hit and Run Injury. The Hit and Run Injury occurred after the minor child was dropped off and was not in the vehicle at the time.

The minor passenger’s mother sought restitution as a crime victim; mainly attorney’s fees for separate Family Court proceedings involving custody and visitation issues between her and Mr. Gahart, who is the father of the minor.

After a De Novo Hearing, the Circuit Court properly decided that the minor child’s presence in the vehicle did not qualify the minor involved, or her mother, to claim restitution in the criminal case because the minor child was not a “victim” under the Operating While Intoxicated with a Minor Child criminal statute under § 973.20.

The Circuit Court was correct in its decision and this Court should affirm the Circuit Court.

STATEMENT OF THE ISSUE

Did the Circuit Court make the correct finding when it determined that under the facts of the case, the minor child who was present in Mr. Gahart’s vehicle, was not a “victim” for restitution purposes?

This Court should conclude that the Circuit Court was correct

in reaching this decision. The minor passenger was not a “victim” under Wis Stat. § 973.20 and the Circuit Court’s denial of restitution was proper under the law.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant/Respondent believes that oral argument is not required as the briefs of the parties will fully and adequately address the issues on appeal. Likewise, the Defendant/Respondent believes publication is not required or warranted on well settled principal and law, clarifications of existing law or criticism of existing law that shall result from the Court ruling on this Appeal. Wis. Stat. § (Rule) 809.22(2)(b).

STATEMENT OF THE CASE

The State Appeals from a Judgement of the Kenosha County Circuit Court, where Mr. Gahart pled guilty and was convicted of Operating A Motor Vehicle While Under the Influence of an Intoxicant with a Minor Passenger in the Vehicle. (R. 68:1), and Hit and Run / Injury. (R. 20:1)

The minor child’s mother filed a restitution request for attorney’s fees and litigation costs allegedly incurred as a result of separate Family Court proceedings, in the amount of \$13,250.00.

Before the final sentencing hearing, the restitution issue was set for a hearing in front of the Court Commissioner, pursuant to Kenosha County practices, and restitution was denied.¹

After the De Novo Review, the Circuit Court denied the request, concluding the minor passenger was not a “victim” as that term is defined under Wisconsin Law for restitution purposes. (R. 48:1-21) The Court then entered a written order denying restitution. (R. 62.1) The State filed a Notice of Appeal. (R. 69)

FACTS OF THE CASE

Mr. Gahart was charged by way of a Criminal Complaint filed on September 3rd, 2019, with Operating A Motor Vehicle While Intoxicated Causing Injury, 2nd Offense, Hit and Run Injury, and Operating A Motor Vehicle While Under the Influence of an Intoxicant. (R. 2, 1-5) An Information was filed on October 22nd, 2019, adding counts based on Blood Alcohol results which had been processed and obtained. (R. 15 1-2) Subsequently, the State filed a Notice of Motion Amend Information on March 5th, 2020. (R. 19:1) On March 18th, 2020, The Stated filed an Amended Information adding new counts for Operating A Motor Vehicle While Under the Influence of an Intoxicant 2nd Offense, with Minor Child in Vehicle, as well as, Operating A Motor Vehicle with a Prohibited Alcohol Concentration, 2nd offense, with a Minor Child in Vehicle. (R. 20, 1-4)

The Criminal Complaint stated that on August 30th, 2019, the

¹ An earlier restitution hearing took place before a Kenosha County Court Commissioner. She denied the restitution request after a hearing. The state filed a request for a De Novo Review before the Judge assigned. (R. 73), (R. 48.20), (R. 48.2)

Kenosha County Sheriff's Department responded to the scene of a traffic accident. The Deputies spoke with DS, who indicated his vehicle had been stuck in the rear by another vehicle, which had caused him to drive into a ditch, and then come out of the ditch back onto the roadway. (R. 2, 2) DS suffered minor injuries to his arm; he was provided band aids and refused medical treatment from emergency services. (R. 2, 2) He indicated the vehicle struck his vehicle and left the scene. (R. 2, 2)

During the investigation of the accident, it was determined that the bumper and the license plate of the offending vehicle had fallen off at the scene. (R. 2:2) Deputies proceeded to Mr. Gahart's residence, as the plate came back to him. (R. 2:2) They made contact with Mr. Gahart who admitted he was the driver of the vehicle at the time of the accident. (R. 2:3)

Prior to the accident, Mr. Gahart had operated his motor vehicle with his minor daughter as a passenger in his motor vehicle. (R. 91) His daughter had been dropped off prior to the accident, and was not in his vehicle at the time the accident occurred. (R. 91) His daughter was under 16 years of age on September 3rd, 2019. (R. 20:3)

A blood sample was taken from Mr. Gahart on September 3rd, 2019. The reported blood alcohol result at the time of the testing was .13mg/ml of blood. (R. 20:2) Mr. Gahart had a prior Refusal to take a chemical test, which is countable as a prior offense under Wisconsin's graduated penalty structure for impaired driving offenses. (R. 2:4)

On February 18th, 2021, Mr. Gahart entered Guilty Pleas to Counts 1, Hit and Run- Causing Injury, and Count 2, Operating A Motor Vehicle While Under the Influence with a Minor Child in the Vehicle. Since no agreement had been reached on restitution, the

cases were to be assigned to a Court Commissioner, per the Kenosha Circuit Court's procedure concerning restitution hearings, prior to a final sentencing hearing. (R. 68.13) The remainder of the counts in the Information were dismissed outright. (R. 68.13)²

The case was assigned to a Court Commissioner and a Restitution Hearing took place on April 20th, 2021. (R. 73:1-7) The Court Commissioner denied the restitution request. (R. 73: 1-7) The State requested a De Novo Hearing review in the Circuit Court. The Court held a sentencing hearing on September 13th, 2021. (R. 91: 1-22)

Prior to the sentencing / De Novo Restitution Review, the State filed a request from the minor child's mother for \$13,250.00 in restitution for attorney's fees and expenses incurred in Family Court proceedings, which she alleged were litigated as a result of Mr. Gahart's conduct on September 13th 2019. (R. 91: 1-4) (R. 48: 4-7)

During the sentencing / De Novo Hearing, the Circuit Court denied restitution after an oral hearing. The Court heard arguments on the threshold issue of whether a minor passenger was a "victim" as legally defined for restitution purposes. (R. 48: 18-20)

The Court identified two legal issues, and inquired whether the dismissed counts were dismissed outright or dismissed and read in. (R 48:1-5) The Court determined they were in fact dismissed outright. (R. 48 - 6,7) The Court then conducted an analysis of whether a minor child was a "victim" as that term as defined. (R. 48: 18-20)

² Under Wisconsin Statute § 973.20, Cases that are dismissed outright cannot be considered by the Court for restitution purposes.

The Court verified that the minor child was not a passenger at the time of the Hit and Run. (R. 48: 7)³

The State argued that the minor child meets the definition of a “victim” because the minor was put in harms way and victimized, as opposed to being a witness in the criminal case. (R. 48: 7-8) Mr. Gahart’s counsel argued that the minor child’s presence in the vehicle constituted a penalty enhancer due to her presence in that vehicle. (R. 48: 13-14) There was a discussion of whether there was a “causal nexus” between the offense and the restitution requested. (R. 48: 14-17)

The Court then separated the two issues and discussed the threshold issue of whether the mere presence of a minor child during an OWI with a passenger qualifies the minor as a “victim”. (R. 48: 16-17) The Court found that Wis. Stat. § 346.65(2)(f) is a penalty enhancer for violating § 346.62 to § 346.64 (R. 48: 18-19) and clearly defined as such in the statutes.

The Court found that the “under 16” provision was a penalty enhancer, and not a separate crime. (R. 48:19) The Court analyzed the Restitution Statute, § 973.20, and noted the particular circumstance that a defendant can be ordered to pay (restitution). (R. 48: 19-20) The Court stated that the Statute laid out “specific outcomes” of a defendant’s crime and that Mr. Gahart’s crimes did not include any of those situations. (R. 48: 19-20) The Court concluded that the minor child was not a victim of the crime that would make her or her mother eligible for restitution, because a

³ The Complainant in Court 1 never requested restitution, nor did the State, thus none was ordered on that count. (R. 48: 19)

crime had not been committed against [the child]. (R. 48:20) The Court declined to address the “causal nexus” issue, stating that it was an issue that would be appropriate for the Family Court case. (R. 48: 22-23)

At the final sentencing hearing on September 13th, 2021, the Court allowed the minor child’s mother to address the court regarding the case. (R. 91: 2-5) The Court indicated this was allowed because “I did not determine (the minor child) did not have victim status... It has more to do to whether or not the status applies to the restitution statute. If the Court had decided that there was no ability for Mrs. Gahart or her daughter to be a victim, Mrs. Gahart wouldn’t have been 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) “So, the determination of the Court was not anything as to status, only whether or not that if applied to the restitution statute which is completely different statute”. (R. 91:6)

The Court denied restitution on the issue of whether the minor child was a “victim” for purposes of Wis. Stat. § 973.20 in this case. The Court issued a written order denying restitution. (R. 62:1) The Court sentenced Mr. Gahart to a withheld sentence and probation on the Hit and Run, (R. 60:1) and ninety (90) days jail, \$1,018.00 fine, plus costs, license revocation, AODA counseling and Ignition Interlock Device on the OWI case. (R. 62:1)

The State filed a Notice of Appeal concerning the restitution issue. (R. 69)

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

The Court should affirm the Circuit Court’s denial of restitution because the minor child and her mother are not “victims” of a crime with a right to restitution under Wis. Stat. § 973.20.

A. Principals of Constitutional and Statutory Interpretations.

The controlling issue in this Appeal is whether a minor passenger is a “victim” for purposes of Wis. Stat. § 973.20 and is entitled to seek restitution.

The Wisconsin Constitution Article I, 9m, (1a) defines “victim”:

- 1a. In this section, notwithstanding any statutory right, privilege or protection, victim means any of the following:
 1. A person against whom an act is committed that would constitute a crime if committed by a competent adult.
 3. If the person under sub. 1a is a minor, the person’s parent, legal guardian or custodian, or other lawful representative.

Prior to 2009, Wisconsin Act 100, Operating a Motor Vehicle While Intoxicated, was not a criminal offense. As the State correctly states, Act 100 has criminalized this offense and the forfeiture

penalty was replaced with criminal punishment and consequences. Prior to Act 100, the civil penalties were doubled, but the offense itself remained a forfeiture. Wis. Stat. § 346.65(2)(f), Wisconsin Act 100 made such conduct a criminal offense: “If there was a minor child in the motor vehicle at the time of the violation... the person shall be fined not less than \$350.00 nor more than \$1,100.00 and imprisoned for not less than five days not more than six months”. 2009 Wis. Act 100, § 49 (Which created Wis. Stat. § 346 (2)(f)(1)).

The statute which prohibits Operating A Motor Vehicle While Under the Influence of an Intoxicant is Wis. Stat. § 346.63, § 346.63(1): “No person may Operate A Motor Vehicle While Under the Influence of an Intoxicant, ... to a degree which renders him or her incapable of safely driving”.

Wis. Stat. § 346.65 is the penalty section for violating sections § 346.62 to § 346.64. Section (2)(f) enhances the penalty from a forfeiture to a criminal offense when certain facts are present.

Wis Stats. § 973.20, the restitution statute, provides for a victim of a crime to seek restitution under certain circumstances specified in that statute.

Wis. Stat. § 950.02(4)(a) states”

4. (a) Victim means any of the following:

- 1) A person against whom a crime is committed.
- 2) If the person specified is sub. 1 is a child, a parent, guardian or legal custodian of a child.

As Article I applies to restitution, this section only provides for restitution only insofar as the legislature confers that right per statute. The legislature makes restitution available to crime victims

under § 973.20 and other statutes, but crime victims are not guaranteed restitution in every instance (Office of Attorney General Opinion, OAG 2-15).⁴

The “Constitutional right” conferred by Article I only comes into effect if the minor child, or her parent, was a “victim” under Wis. Stat. § 950.04(v)(a), § 950.02(4)(a), § 973.20, and Wis. Stat. § 346.65.

This appeal requires interpreting both constitutional and statutory provisions. Constitutional and statutory interpretation principals are similiar, in that the plain meaning of context and words are examined.

The sources used to interpret a constitutional provision include (1) the plain meaning of the words in the context used, and (2) the constitutional debates and practices in existence at the time of the writing of the constitution. *Shilling v. State Crime Victims Rts. Bd.*, 2005 WI 17 at 16, 278 Wis.2d 216, 692 N.W.2d 623.

Statutory interpretation principles similiarly require reviewing the plain meaning of words and the context used. *State ex rel Kalal v. Cir. Ct for Dane Cty.*, 2004 WI 58. 45-46, 271 Wis. 2de 633, 681 N.W. 110. Mr. Gahadt would agree with the State that this case involves interpretation of Wis. Const. Art. I Section 9m(1)(a), and Wisconsin Stats Secs. 950.02(4)(a); 950.04(1v)(r) , 973.20, and 346.65(2)(f).

B. Operating a motor vehicle while under the influence of

⁴ Regarding Attorney General Opinions; Although not obligated to follow interpretations provided by the office of the Attorney General, “Well reasoned OAG opinions have persuasive value when a court later addresses the meaning of the same statute.” (Wisconsin Department of Justice Website; <https://www.doj.state.wi.us/ag-opinions>)

and intoxicant with a minor passenger in the vehicle is a crime, but mere presence of the child does not make the minor passenger a crime “victim” for purposes of § 973.20.

The State in its brief, declares the minor child a “victim” in this case. But does the mere presence of a minor child in the vehicle automatically confer that status?

Operating A Motor Vehicle While Under the Influence of an Intoxicant is a criminal offense under 2009 Wisconsin Act 100, § 49, which created Wis. Stat. § 346.65(2)(f)(1). Prior to Act 100, it was a forfeiture, but the presence of a minor child doubled the forfeiture penalty provisions.

The **presence** of a minor child adds an element of the offense which must be proved by the State beyond a reasonable doubt for criminal penalties to apply. The OWI Statutes consist of two separate provisions: § 346.63 provides the elements that must be proven; § 346.65(2r) provides an enhanced penalty structure based on whether other facts exist: whether there were prior countable OWI offenses, whether there was a minor in the vehicle at the time of operation, and whether there were injuries caused by the operation of the motor vehicle while intoxicated.

There is nothing in § 346.65 (2)(f) that specifically indicates a minor child should be considered as a “victim” under that section. The establishment of that fact by the State is an element of the crime for the purpose of enhancing a forfeiture case to a criminal case and increasing the penalty structure. It does not automatically confer “victim” status to the minor child in the vehicle.

Wisconsin Criminal Law has other examples of where the

penalty for violating a criminal statute is enhanced by the proximity or the presence of a person or place. The Controlled Substances Statute, Wis. Stat. § 961.41, provides it is unlawful to deliver or possess with intent to deliver various controlled substances. Wis. Stat. § 961.49 enhances the maximum term of imprisonment for the listed crimes by five years if the offender is: (a) in or on the premises of a scattered site public housing project, or (b) in, on or within 1000 feet of a park, jail, housing project, swimming pool, youth or community center, private or public school, or school bus. Similar to the Wis. Stats. § 346.65(2)(f)(1), the controlled substance statute add another fact and element the State has to prove to provide for an enhanced penalty for violation of the offense.

With a “broad” interpretation of § 961.49, children at a school within 1000 feet of a controlled substance delivery, could be considered as “victims” of that offense and would be eligible to seek restitution from an offender who delivers a controlled substance within 1000 feet of their school. That is not what the legislature intended in enacting that enhanced penalty.

What Wis. Stat. § 961.49 and § 946.65(2)(f) represent are the increased penalties for conduct that increase the potential for harm or danger to the community and to children. They serve the dual purpose of increasing punishment and deterring that type of conduct by individuals who engage in it. Fortunately, the potential for harm and danger to the community are usually not realized.

Operating While Under the Influence of an Intoxicant poses a danger to society in general. Courts across the Nation are faced with OWI cases where citizens are killed or injured by drunk drivers on a daily basis. By adding an enhanced penalty for a motorist who has a child under 16 years of age in the vehicle, the Legislature recognized

the potential for harm or danger posed to a minor passenger when present in a motor vehicle being operated by an intoxicated motorist. But if that potential harm or danger did not occur to the minor while in the vehicle, is that minor a crime victim for the purposes of restitution in a criminal case? In this case, there were no allegations in the charging documents that the minor child was injured in any way.

The Circuit Court properly recognized the presence of a minor child inside the vehicle as exactly what it is, a penalty enhancer. (R. 91, 19) Mr. Gahart would submit that the minor passenger in this case is not a “victim” based on the provisions of Wis. Stat. § 346.65(2)(f), and the facts of this case for purposes of § 973.20.

C. The Definition of victim in the Wisconsin Constitution does not make the child a victim in this case for Wis. Stat. § 973.20 purposes.

The definition of “victim” in Article I of the Wisconsin Constitution is “A person against who an act is committed that would constitute a crime.” Does a penalty enhancing statute, separate from the statute defining the crime, make the mere presence of that minor inside the vehicle a fact that confers “victim” status upon her for § 973.20 purposes? Was a crime committed against her? Or is the enhanced penalty intended to protect children present in a vehicle and to deter intoxicated motorists from operating vehicles with children present in that vehicle? OWI is an offense against the public, not necessarily one individual person. The presence of a minor is an aggravating factor that triggers increased punishment.

In this case, the court permitted the minor child’s mother to address the court prior to Mr. Gahardt’s sentencing. (R. 91 2-6) The court specifically found that the minor child and her mother had

victim status under the Constitution and Wis. Stat. § 950.02 to address the court during sentencing, but that status did not apply for restitution purposes under § 973.20. The legislature makes restitution available to crime victims under § 973.20 and other statutes, but crime victims are not guaranteed restitution in every instance. In this case, the court properly reviewed § 973.20 and found that the minor passenger did not have a right to restitution under the terms of § 973.20.

The Appellant in its Brief, argues that “Marsy’s Law” supports their assumption that a minor passenger in an enhanced OWI case should be considered a “victim” for restitution purposes when a criminal defendant is convicted of that offense. However, Marsy’s Law is not designed to punish or deter criminal defendants, but was created to protect victims from systematic wrongdoing and disregard from state actors; specifically law enforcement agencies, prosecutors and judges.⁵

A restitution hearing in a criminal proceeding is part of the criminal sentencing process, and serves the goals of the criminal justice system. *State v. Sweat*, 208 Wis. 2nd 409, 561 N.W. 2d 695 (1997). Marsy’s Law is designed to protect victims of crime through the process, but it does not alter the definition of a “victim” contained in the Wisconsin Constitution or the relevant statutes for the purposes of this Appeal. In this case, it appears the State properly regarded the minor passenger’s rights and the court allowed her mother to speak at Mr. Gahart’s sentencing.

D. The definition of victim in Wis. Stat. § 950.02(4)(a) and

⁵ Marsy’s Law changes for crime victims. Wisconsin Lawyer Article. Restitution is not a cause of action but a sanction for criminal conduct owned by the state, not to the victims. *Huml v. Vlazny*, 2006 WI 87, ¶ 22, 293 Wis 2d 169, 716 2d 807.

the right to restitution in the Bill of Rights for Crime Victims Wis. Stat. § 950.04(1v)(q) doesn't make the minor child a victim for purposes of § 973.20.

Wisconsin Stat. § 960.02(4) (a) provides:

“Victim” means any of the following:

1. A person against whom a crime has been committed.
2. If the person specified in subd. 1. is a child, a parent, guardian or legal custodian of the child.

The Bill of Rights for Crime Victims provides that the victims of Crimes have the following rights:

950.04(1v)(q) - To restitution, as provided under Wis. Stats. 938.245(2)(a)5., 938.32(1t), 938.34(5), 938.345, 943.212, 943.23(6), 943.245, 943.51 and 973.20.

In this case, the Court allowed the minor child's mother to address the court under § 950.02 during the sentencing hearing, but found the child not to be a “victim” for restitution purposes under § 973.20, which the court noted was an “entirely different statute”. (R. 91, 6) Although § 950.02 confers various rights upon crime victims, the Court found that it did not automatically confer the right to restitution under § 973.20 in this case. The Court correctly decided that § 973.20 is a different statute which sets forth the requirements for restitution to be ordered in a criminal case.

E. The provisions where a “victim” is entitled to restitution under Wis. Stat. § 973.20 are not present in this case.

Wis Stat. § 973.20, establishes the situations where restitution can be sought by victims of crime and what they can seek restitution

for:

- (2) If a crime considered at sentencing resulted in damage to or loss or destruction of property, the restitution order may require that the defendant:
 - (a) Return the property to the owner or owner's designee, or
 - (b) If return of the property under para. (a) is impossible, impractical or inadequate, pay the owner or owner' designee the reasonable repair or replacement cost or the greater of:
 1. The value of the property on the date of it's damage, loss or destruction; or
 2. The value of the property on the date of sentencing, less the value of any part of the property returned, as of the date of it's return. The value of retail merchandise shall be it's retail value.
- (3) If a crime considered at sentencing resulted in bodily injury, the restitution order may require that the defendant do one or more of the following:
 - (a) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to a physical, psychiatric and psychological care and treatment.
 - (b) Pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation.

- (c) Reimburse the injured person for income lost as a result of a crime considered at sentencing.
 - (d) If the injured person's sole employment at the time of the injury was performing the duties of a homemaker, pay an amount sufficient to ensure the duties are continued until the person is able to resume performance of the duties.
- (4) If 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 § 895.04(5)
- (4m) If the defendant violated § 940.225, § 948.02, § 948.05, § 948.06, §948.07 or § 948.08 and sub. (3)(a) does not apply, the restitution order may require that the defendant pay an amount, not to exceed \$10,000.00, equal to the cost of necessary professional services relating to psychiatric and psychological care and treatment. The \$10,000.00 limit under this subsection does not apply to the amount of restitution ordered under sub (3) or (5) for the cost of necessary professional services relating to psychological care and treatment.
- (5) In any case, the restitution order may require that the defendant do one or more of the following:
 - (a) 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 for his or her conduct in the connection of a crime considered at sentencing.

- (b) Pay an amount equal to the income lost, and a reasonable out of pocket expenses incurred, by the person against whom a crime considered at sentencing was committed resulting from the filing of charges or cooperation in the investigation and prosecution of the crime.
- (c) Reimburse any person or agency for amounts paid as rewards for information leading to the apprehension or successful prosecution of the defendant for a crime which the defendant was convicted or to the apprehension or prosecution of the defendant for a read in crime.
- (d) If justice requires, reimburse any insurer, surety or other person who has compensated a victim for a loss otherwise compensable under this section.

The court in this case reviewed Wis. Stat. §973.20 to determine whether any of the factual situations triggering restitution were present in this case. (R 91,19) The Court found no damage to property, no bodily injury, no death, no sexual assault, no professional services, or relocation services. (R. 91, 20) The Court found that § 973.20 discussed specific outcomes of a defendant's crime, and determined none of them to be present in this case. (R. 91, 20) The Court found that there was no crime committed against

the minor in this case. (R. 91-20)

The Appellant in this case is urging the court to broadly interpret the definition of “victim” for § 973.20 purposes, to include a minor child who is merely present in a vehicle being operated by an intoxicated motorist, when none of the enumerated subsections contained in § 973.20 are present.

In urging a broad interpretation of the definition of “victim”, the Appellant cited several cases where individuals were found to be victims despite not being named in a charging document. In *State v. Agosto*, 2008 WI App 149, 314 Wis 2d, 385, 760 N.W. 2d 415, the Defendant’s mother posted bond which was forfeited when the defendant violated a condition of bond. The court in *Agosto* originally decided to order Mr. Agosto to reimburse his mother as “restitution”, but later changed the order and made reimbursement a condition of Agosto’s extended supervision. By posting the bail money and having it forfeited, Agosto’s mother was the victim of a direct pecuniary loss caused by Agosto’s failure to comply with his conditions of bond. Whether she was listed in the charging documents is irrelevant. She was the direct victim of Mr. Agosto’s criminal conduct and suffered losses contemplated in § 973.20.

In *State v. Houseman*, 2011 WI App 88, 334 Wis 2d 415, 799 N.W. 2d 479, the defendant and co actors had rented an old farmhouse for the purposes of an indoor marijuana grow operation. During that criminal enterprise, over \$100,000.00 damage had been done to the home. As a result of the damages, the home was rendered uninhabitable. The court found that the homeowners were “direct victims” of the criminal conspiracy involved. The house was rented for the purposes of growing marijuana in furtherance of the conspiracy, and the house was altered to the extent it was made

uninhabitable. *Houseman*, Wis. 2d at 427. The homeowners were clearly victims of the criminal conspiracy and suffered loss and damages directly contemplated under Wis. Stats. § 973.20(2).

The inclusion or exclusion of an individual in charging documents is not determinative of whether or not that person or entity is a victim of a crime entitled to restitution under § 973.20. The naming of a person in charging documents does not automatically confer “victim” status upon them for § 973.20 purposes. The inquiry is whether that person or entity has a claim to restitution in a criminal case based on the subsections contained in that statute.

The Circuit Court in this case reviewed § 973.20 in its analysis of whether the minor child was a “victim” for purposes of that statute and entitled to a restitution order. The court found that none of the subsections of § 973.40 applied to the minor child who was merely present during the operation of the motor vehicle by Mr. Gahart in this case.

The Circuit Court decided that a minor child is not a “victim” for § 973.20 purposes simply by virtue of her being present in Mr. Gahart’s vehicle when he was intoxicated. Her presence in the vehicle enhances the penalty from a forfeiture to a crime, but that does not make the child a “victim” entitled to restitution under § 973.20. The court complied with Article I of the Wisconsin Constitution, and § 950.02 and § 950.04 in allowing the minor’s mother to address the Court in the sentencing hearing in this case. Whether the minor child was a “victim” for § 973.20 purposes is a separate issue, which the Court properly decided. The court reviewed § 973.20 and made the correct decision that none of the sections of that statute apply to the minor child or the facts of this

case and restitution should not be ordered.

This Court should conclude that the Circuit Court properly decided that the minor child was not a “victim” for purposes of § 973.20, and denial of restitution was proper in this case. The Court should affirm the Circuit Court’s order.

CONCLUSION

This Court should affirm that Circuit’s Court’s order and judgement denying restitution in this case.

Dated this 15th day of April, 2022.

Respectfully submitted,

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Electronically signed by:

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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 6348 words.

Dated this 15th day of April, 2022.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.08(6), I electronically file 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 15th day of April, 2022.

Electronically signed by:

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