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

# REPLY BRIEF OF PLAINTIFF-APPELLANT

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### 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. The definition of "victim" in the state constitution and the crime victim rights statutes provides the meaning of "victim" for restitution purposes.

The term "victim" has a legally understood meaning, defined in the state constitution and statutes. Wis. Const. art. I, § 9m(1)(a); Wis. Stat. § 950.02(4)(a). The constitution and statutes define "victim" to include both a minor child against whom the crime was committed and the child's nonoffending parent. (State's Br. 16–17.)

At the sentencing hearing, the circuit court properly identified the minor passenger and the minor's nonoffending parent as victims. (R. 91:5–6.) The circuit court expressly referenced the state constitution and statutes when it recognized the "victim status." (R. 91:5–6.) Gahart did not object to such a designation at the sentencing hearing. (R. 91:6.)

But at the earlier restitution hearing, both the circuit court and Gahart alleged the minor passenger and minor's nonoffending parent were not victims. The circuit court concluded that "this case is not a case in which there is a victim." (R. 48:20.) The circuit court thought operating a motor vehicle under the influence with a minor passenger under 16 years of age in the vehicle was a victimless crime. Gahart shared the circuit court's assessment. (R. 48:13–14; 48:3 (characterizing the minor's mother as "not even a victim").)

On appeal, Gahart renews the circuit court's rationale that a person's victim status may change at a restitution

hearing versus a sentencing hearing. (Gahart's Br. 19–20.) He embraces the circuit court having found that the minor passenger and the minor's nonoffending parent had "victim status" at the sentencing hearing, while failing to have such status at the restitution hearing. (Gahart's Br. 19–20.)

Both the circuit court and Gahart mistakenly believe a person may satisfy the statutory definition of "victim" under Wis. Stat. § 950.02(4)(a) in the victim rights statute, but then lose the designation as a "victim" under the restitution statute in Wis. Stat. § 973.20(1r). (Gahart's Br. 21 (citing R. 91:6).) Such a position is squarely at odds with precedent.

The supreme court and this Court have repeatedly concluded that "victim" in the restitution statute is most reasonably interpreted using the definition in the victim rights statute in Wis. Stat. § 950.02(4)(a). *State v. Gribble*, 2001 WI App 227, ¶ 71, 248 Wis. 2d 409, 636 N.W.2d 488, *cited in State v. Muth*, 2020 WI 65, ¶ 43, 392 Wis. 2d 578, 945 N.W.2d 645; *see State v. Hoseman*, 2011 WI App 88, ¶ 15, 334 Wis. 2d 415, 799 N.W.2d 479 (turning to Wis. Stat. § 950.02(4)(a) to define "victim" in the restitution statute); *State v. Johnson*, 2002 WI App 166, ¶ 17, 256 Wis. 2d 871, 649 N.W.2d 284 ("victim" in the restitution statute is most reasonably interpreted under the definition in Wis. Stat. § 950.02(4)(a)); *see also Muth*, 392 Wis. 2d 578, ¶ 137 (Hagedorn, J., dissenting) ("And for purposes of restitution, victims are defined under Wis. Stat. § 950.02(4).").

Gahart presents an argument to this Court that has been soundly and repeatedly rejected; the meaning of "victim" does not change from a sentencing hearing to a restitution hearing. He ignores binding precedent on this issue. Gahart relies on and cites to *Hoseman* in his brief to this Court when presenting the standard of review. (Gahart's Br. 13 (citing *Hoseman*, 334 Wis. 2d 415, ¶ 12).) But he ignores that—only three paragraphs later—*Hoseman* confirmed the term "victim" had a uniform meaning in the victim rights and

restitution statutes. *See Hoseman*, 334 Wis. 2d 415, ¶ 15 (turning to the victim rights statute to define "victim" in the restitution statute).

A person's status as a "victim" in a criminal case does not change from one hearing to another. The person does not lose designation as a "victim" at a restitution hearing that the person had at the sentencing hearing; the term "victim" has the same statutory meaning at both hearings. *See Gribble*, 248 Wis. 2d 409, ¶ 71, *cited in Muth*, 392 Wis. 2d 578, ¶ 43 (unifying the definition of "victim" in the victim rights and restitution statutes).

### B. The minor passenger and nonoffending parent are victims because the crime of operating a motor vehicle with a minor passenger under 16 years of age in the vehicle is a crime committed against the minor passenger.

#### 1. The minor's presence in the vehicle is an element of the crime, making the minor a person against whom the crime was committed.

Operating a motor vehicle under the influence with a minor passenger under 16 years of age in the vehicle is a crime with 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 motor vehicle; and (3) "There was a minor passenger under 16 years of age in the vehicle." Wis. JI–Criminal 2663D (2011). The State must prove each element beyond a reasonable doubt, *id.*, even for a first offense, 2009 Wis. Act 100, § 49 (creating Wis. Stat. § 346.65(2)(f)1.).

At the plea hearing, the circuit court properly recognized and explained to Gahart the three elements that the State would have to prove for the 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.) Gahart affirmed his understanding of the elements. (R. 68:9.)

But at the subsequent restitution hearing, both the circuit court and Gahart alleged that he was convicted of a two-element crime. The circuit court said that "it's two steps: one that they operated a motor vehicle on a public highway of the state, and then, two, that they operated that motor vehicle while under the influence of an intoxicant, which is defined as materially impairing their ability to safely maintain their vehicle." (R. 48:18–19.) The circuit court reclassified the third element as a "penalty provision" and "penalty enhancer." (R. 48:19.) Gahart shared the circuit court's new description that the third element had become a "penalty enhancer." (R. 48:14.)

On appeal, Gahart acknowledges that the minor child's presence in the motor vehicle "adds an element of the offense." (Gahart's Br. 17.) Although he again characterizes the minor passenger's presence as a "penalty enhancer" (Gahart's Br. 19), he concedes it is a three-element crime (Gahart's Br. 17).

Gahart attempts to divert attention away from the minor passenger element through a kind of slippery slope argument regarding a penalty enhancer. He argues that identifying the minor passenger as a victim here may result in "children at a school within 1000 feet of a controlled substance delivery . . . be[ing] considered as 'victims'" for crimes under the controlled substances act. (Gahart's Br. 18 (citing Wis. Stat. § 961.49).) But a material difference exists between the minor passenger element and the controlled substance sentencing enhancer. The minor passenger element requires the State to prove beyond a reasonable doubt that "[t]here was a minor passenger under 16 years of age in the vehicle." Wis. JI–Criminal 2663D. The criminal

conduct is directed at a person (i.e. the minor passenger). In contrast, the controlled substance sentencing enhancer does not pertain to a person; it pertains to a location (i.e. a school). Wis. JI–Criminal 6004 (2003) (enhancer jury instruction). This Court need not speculate whether students at a school may request restitution. *See State v. Vinje*, 201 Wis. 2d 98, 105, 548 N.W.2d 118 (Ct. App. 1996) (discouraging speculation into the application of victim rights against a large group of people). This Court should wait until that issue comes before it. *See Carlson v. Pepin Cty.*, 167 Wis. 2d 345, 358, 481 N.W.2d 498 (Ct. App. 1992) (waiting for another day to decide an issue not before a court).

The addition of the third element—the presence of the minor passenger—elevating the penalty does not change its status as an element of the crime. The statutes contain other instances of a more serious crime having an enhanced penalty through the addition of an element. *Compare* Wis. Stat. § 941.30(1) *and* Wis. JI–Criminal 1345 (2020), with Wis. Stat. § 941.30(2) *and* Wis. JI–Criminal 1347 (2015) (converting a two-element crime to a three-element crime that enhances the penalty for reckless endangerment). The additional element may be described as a penalty enhancer. *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). But it is still an element of the crime. Wis. JI–Criminal 2663D.

The parties agree operating a motor vehicle under the influence with a minor passenger under 16 years of age in the vehicle is a three-element crime. (State's Br. 15–16; Gahart's Br. 17.) The jury instructions confirm that the third element relates to the presence of a minor passenger. Wis. JI–Criminal 2663D. The circuit court was incorrect to reclassify it as a two-element crime at the restitution hearing; the circuit court was correct when identifying it as a three-

element crime at the plea hearing. The elements of the crime do not change from a plea hearing to a restitution hearing.

The minor passenger is a victim because Gahart committed this crime against this person. A defendant commits a crime when every element of the offense is present. *See State v. Schleusner*, 154 Wis. 2d 821, 824, 454 N.W.2d 51 (Ct. App. 1990) (proof of every element required). Gahart does not commit this crime without the third element; that is, without the presence of the minor passenger. Wis. JI–Criminal 2663D. The minor's presence in the vehicle is an element of the crime, making the minor a person against whom Gahart committed his crime.

**2. The minor passenger is an identifiable person against whom the crime was committed.**

When "there is 'an identifiable person against whom a crime has been committed,'" there is a crime victim "even when a defendant has been convicted of a crime which ordinarily presents no victims." *Vinje*, 201 Wis. 2d at 105 (quoting 79 Op. Att'y Gen. 5 (1990)). So characterizing the minor passenger element as a penalty enhancer to avoid paying restitution, as Gahart attempts to do in this case, is inapposite. (State's Br. 21.) "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. (State's Br. 21 (citing *State v. Foley*, 142 Wis. 2d 331, 343, 417 N.W.2d 920 (Ct. App. 1987)).) For example, a victim can be the homeowner when a defendant used the house to commit the crime of conspiracy to manufacture marijuana. (State's Br. 21–22 (citing *Hoseman*, 334 Wis. 2d 415).)

Even assuming arguendo the minor passenger element is not dispositive, Gahart still committed the crime against the minor passenger. Here, regardless of the elements of the offense, the minor child is an identifiable person against

whom the crime was committed. *See Vinje*, 201 Wis. 2d at 105 (citing 79 Op. Att'y Gen. 5). Thus, the circuit court erred because the minor passenger is a "victim," within the legal meaning of that term. As a victim, the minor passenger has a constitutional entitlement and statutory right to restitution. (State's Br. 17 (citing Wis. Const. art. I, § 9m(2)(m); Wis. Stat. § 950.04(1v)(q)).) A circuit court cannot strip away such rights at a restitution hearing.

This Court should conclude that the crime—operating a motor vehicle with a minor passenger under 16 years of age in the vehicle—is committed against the minor passenger such that the minor is legally a "victim," as defined in the state constitution and statutes. Wis. Const. art. I, § 9m(1)(a)1. ("'victim' means . . . [a] person against whom an act is committed that would constitute a crime if committed by a competent adult"); Wis. Stat. § 950.02(4)(a)1. ("'Victim' means . . . [a] person against whom a crime has been committed."). Even the circuit court recognized as much: "Just so it's clear from the record, I did not determine that she did not have have [sic] victim status." (R. 91:5.) The circuit court explained the minor passenger and nonoffending parent satisfied the meaning of victim for the "rights afforded to victims in the 950 statute and by the Constitution of the State of Wisconsin." (R. 91:6.) The minor passenger is a victim because Gahart committed his crime against this identifiable person. *See Vinje*, 201 Wis. at 105 (citing 79 Op. Att'y Gen. 5).

### 3. The nonoffending parent is a victim because the crime of operating a motor vehicle with a minor passenger is a crime committed against this parent's minor child.

A nonoffending parent is a victim when a defendant commits a crime against that parent's minor child. Wis. Const. art. I, § 9m(1)(a)3., (b); Wis. Stat. § 950.02(4)(a)2., (b). Here, Gahart committed a crime against the minor passenger,

*supra* Section B.1., 2. The constitution and statutes are clear that under such a circumstance, the minor child's nonoffending parent is a victim. (State's Br. 19.)

### C. This Court should remand for an evidentiary hearing on the victims' restitution claim.

The State explained in its opening brief that remand is the appropriate remedy. (State's Br. 23–24.) The minor passenger and nonoffending parent each are legally identified as a "victim" under the state constitution and statutes, *supra* Section B. So they have a constitutional entitlement and statutory right to restitution. Wis. Const. art. I, § 9m(2)(m); Wis. Stat. § 950.04(1v)(q). Remand is the proper outcome because the circuit court denied the restitution claim under the wrong legal analysis without conducting an evidentiary hearing such that the record is insufficient for this court to decide restitution. (State's Br. 23–24.)

Gahart errs when he asks this Court to affirm the circuit court's order and judgment that denied the restitution claim without an evidentiary hearing. (Gahart's Br. 27 (conclusion).) Gahart's final argument conflates the fact-intensive question from the purely legal issue before this Court. He argues that "[t]he provisions where a 'victim' is entitled to restitution under Wis. Stat. § 973.20 are not present in this case." (Gahart's Br. 21.) But the record is incomplete to make such a claim. (State's Br. 23–24.) Gahart has erred by comingling the purely legal issue before this Court with an unresolved factual inquiry needing resolution in the circuit court.

Gahart relies on an attorney general opinion to argue "crime victims are not guaranteed restitution in every instance." (Gahart's Br. 16 (citing OAG–02–15 (Jan. 2, 2015)).) The State certainly agrees that a court may rely on the persuasive value of a "well-reasoned attorney general's

opinion interpreting a statute." *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 126, 327 Wis. 2d 572, 786 N.W.2d 177. But Gahart's reliance on this opinion is misguided.

This opinion does not help Gahart. He takes the relevant passage out of its context in the opinion. The opinion does state that "crime victims are not guaranteed restitution in every instance." OAG–2–15, ¶ 2. But the context of the statement concerned whether the Department of Corrections may collect supervision fees before restitution has been paid. *Id*. The attorney general opined that, under the statutes in effect at the time of the opinion, the Department "may lawfully collect supervision fees . . . before the offender has paid court-ordered restitution in full." *Id*. ¶ 1.

The Legislature was quick to rebuke the Department's practice of collecting supervision fees ahead of restitution. The Legislature enacted 2015 Wis. Act 355 to prohibit the Department "from collecting a fee . . . unless all restitution payments due from the person have been paid."[1] The legislators that introduced the bill explained it was "an important piece of legislation that focuses on the victims of a crime and ensures restitution payments are made a priority."[2]

The attorney general opinion does not help Gahart. It considered the order of collection between restitution and supervision fees. The Legislature responded with an act that "puts crime victims first" that made "changes to restitution

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[1] Wis. Legis. Council, Act Memo, *2015 Wis. Act 355: Restitution Owed to Victims of Crime*, 1. https://docs.legis.wisconsin.gov/2015/related/lcactmemo/act355.pdf.

[2] Memorandum from Senator, Luther Olsen & Representative Rob Hutton to the Assembly Comm on Criminal Justice & Public Safety (Jan. 14, 2016), https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2015/ab663/ab0663_2016_01_14.pdf.

payments in order to make this process more effective, efficient, and easier for victims."[3]

The issue before this Court is whether the minor passenger and minor's nonoffending parent are victims entitled to make a restitution claim that then may be resolved at an evidentiary hearing. It is not whether crime victims are guaranteed restitution in every instance. (Gahart's Br. 16 (citing OAG–2–15).) It is only by proceeding to the restitution hearing that a circuit court may determine the merits of a particular claim. This Court should remand for such a hearing.

* * * * *

Our constitution preserves and protects a victim's right to justice and due process that includes the right to full restitution. Wis. Const. art. I, § 9m(2)(m). The Legislature has tried to make the process effective, efficient, and easy for a victim.[4] Here, the circuit court denied restitution under the wrong legal analysis and failed to conduct the evidentiary hearing necessary to properly decide the claim. The proceedings in the circuit court did not meet the constitutional declaration and legislative objective.

[3] Olsen & Hutton, *supra* note 2.

[4] Olsen & Hutton, *supra* note 2.

## CONCLUSION

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. It should remand for an evidentiary hearing on the victims' restitution claim.

Dated this 29th day of April 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 2,988 words.

Dated this 29th day of April 2022.

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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 29th day of April 2022.

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