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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAECORION J. ROBINSON,

Defendant-Appellant.

Hon. J.D. Watts

Milwaukee County

Circuit Case No. 20CF410

Appeal Case No. 22AP2087

**ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT
THE HONORABLE J.D. WATTS**

REPLY BRIEF OF DEFENDANT-APPELLANT

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THE HONORABLE J.D. WATTS PRESIDING**

BRIEF OF DEFENDANT-APPELLANT

ARGUMENT IN REPLY

THE CIRCUIT COURT CORRECTLY IDENTIFIED THE LEGAL STANDARD THAT CONTROLS THE FACTS OF THIS CASE BUT DID NOT LOGICALLY INTERPRET THE FACTS WHEN APPLYING THE STANDARD.

1. Summary of the Argument

The circuit court correctly identified the legal standard that applies when the court considers an order for the payment of restitution. However, the court applied that standard to an illogical interpretation of the facts presented. As such, the court erred in ordering Mr. Robinson to pay restitution for his brother's crimes. The facts presented

demonstrate that no causal connection exists between the crime considered at Mr. Robinson's sentencing hearing, and the loss suffered by the parents of the victims. Put another way, Mr. Robinson's conduct was not a substantial factor in causing the damages claimed. Therefore, the court erred in ordering Mr. Robinson to pay restitution.

2. The Circuit Court Identified the Correct Legal Standard When Addressing the Matter of Restitution.

As noted in the Appellant's brief, the court identified the proper legal standard to be applied when determining whether the defendant should be ordered to pay restitution. Specifically, the court cited the opinion in *State v. Tarlo*, and acknowledged that a causal connection must exist between the crime considered at sentencing and the damage claimed. (Appellant's Br. 9) See also, *State v. Tarlo*, 2016 WI APP 81, ¶6, 372 Wis. 2d 333, 338, 887 N.W.2d 898, 900.) When evaluating the appropriateness of an order for the payment of restitution, the court must find that a substantial causal connection exists between the crime considered at sentencing and the damage claimed. *State v. Tarlo*, *Id.* While circuit courts have discretion when making this determination, (*Id.*) that discretion does not dispense with the requirement that an actual causal connection exist between the defendant's crime considered at sentencing (the defendant's conduct) and the damage claimed.

Wisconsin appellate decisions have consistently adopted and reinforced this standard when reviewing lower court decisions ordering the payment of restitution. In *State v. Johnson*, the court stated that, "[c]ircuit courts have discretion ... in determining whether the defendant's criminal activity was a substantial factor in causing any expenses for which restitution is claimed." *State v. Johnson*, 2002 WI App. 166, ¶ 7, 256 Wis. 2d 871, 877, 649 N.W.2d 284. In *State v. Canady*, the court stated that, "[b]efore restitution can be ordered, a causal nexus must be established between the 'crime considered at sentencing,' ... and the disputed damage." *State v. Canady*, 2000 WI App. 87, ¶ 9, 234 Wis. 2d 261, 267, 610 N.W.2d 147, citing, *Wis. Stat.* § 973.20(2), and *State v. Madlock*, 230 Wis.2d 324, 329, 602 N.W.2d 104 (Ct. App. 1999). In *State v. Wiskerchen*, the court stated that, "[t]he victim needs to show that there is a 'causal nexus' between the crime and the victim's losses, such that the defendant's criminal activity was a 'substantial factor' in causing the losses." *State v. Wiskerchen*, 2019 WI 1, ¶ 10, 385 Wis. 2d 120, 921 N.W.2d 730, citing *Canady*, *supra* ¶ 9. While the court has

discretion in ordering the payment of restitution, the court must first find that a causal nexus exists between the defendant's criminal action and the claimed loss.

The court also correctly understood that the legal standard requires the loss claimed to be tied to a crime considered at sentencing. This can be seen in the court's analysis of the facts before the court and the elements contained in the jury instruction for aiding or harboring a felon. (58:12-14) The court's analysis is discussed in Mr. Robinson's brief on page 10 and is incorporated here by reference. In this regard, appellate decisions provide guidance as to what constitutes a "crime considered at sentencing."

The Wisconsin Supreme Court defined a "crime considered at sentencing" in *State v. Wiskerchen*. There, the court stated that, a "'crime considered at sentencing' means the crime of conviction and any read-in." *Wiskerchen*, at ¶ 24. While this language is clear, it can be interpreted broadly to include "'all facts and reasonable inferences concerning the defendant's activity related to the 'crime' for which the defendant was convicted, not just those facts necessary to support the elements of the specific charge of which the defendant was convicted.'" *Wiskerchen*, at ¶ 26. (underscore in original), *citing Canady*, supra at ¶ 10. The court's guidance in *Wiskerchen* is instructive and maintains the requirement that the defendant's conduct must be connected to the crime "for which the defendant was convicted." *Wiskerchen*, at ¶ 26. Although the circuit court correctly identified the legal standard, the court applied the standard to an illogical interpretation of the facts.

3. The Circuit Court Did Not Logically Interpret the Facts When Applying the Legal Standard and Therefore Erred When it Ordered Mr. Robinson to Pay Restitution.

The interpretation of facts presented to the court is central to a determination of whether the court appropriately exercised its discretion. Here, the court did not logically interpret the facts and therefore erroneously exercised its discretion when applying those facts to the legal standard discussed above. Essentially, the court interpreted the facts presented in such a way as to conclude that Mr. Robinson's conduct "did substantially cause the damage because of the intertwining of the hit and run causing death in the aiding a felon statute." (58:15) The court's error lies in the conclusion that Mr. Robinson's conduct substantially caused the death of the minor children. A review of

facts examined by Wisconsin's appellate courts helps to illustrate when circuit courts appropriately exercise discretion in the context of ordering restitution, and when they do not.

The State and defense cited several cases in their briefs wherein the court has reviewed the discretion of circuit courts when ordering restitution. The facts set forth in those cases help to identify a circuit court's appropriate and inappropriate use of discretion. A brief review is illustrative here.

In *State v. Tarlo*, the defendant possessed images depicting child pornography. The mother of a child in one of the images possessed by Tarlo sought restitution to cover the sum of lost economic support she suffered when her husband was incarcerated for producing the pornographic image of her daughter; the image later possessed by Tarlo. *Tarlo*, 372 Wis. 2d 333, 336. The circuit court granted restitution and this court reversed that decision.

In reversing the order, this court noted that:

While we are to “construe the restitution statute broadly and liberally in order to allow victims to recover their losses,” those losses must still be shown to be “as a result of a defendant's criminal conduct.” *State v. Longmire*, 2004 WI App 90, ¶ 11, 272 Wis.2d 759, 681 N.W.2d 534 (citation omitted). It is a “bedrock principle” that restitution should reflect, and a defendant should be made liable for, “the consequences of the defendant's own conduct,” “not the conduct of others.” *Paroline v. United States*, —U.S. —, 134 S.Ct. 1710, 1725, 1729, 188 L.Ed.2d 714 (2014). *Tarlo*, at 338.

This court went on to state that:

Here, the evidence presented at the restitution hearing establishes only financial losses incurred as a result of the earlier conduct of the mother's husband in producing the child pornography; it does not establish that any of the losses resulted from Tarlo's criminal conduct, or even general trafficking of the daughter's image over the Internet. *Tarlo*, at 339.

Tarlo is particularly instructive because it clearly states that a defendant should not be made liable for the consequences of someone else's conduct. Moreover, a defendant should only be made liable for the defendant's own conduct despite a broad and liberal construction of the restitution statute. *Tarlo*, at 338-339. Thus, while the restitution statute is to be considered

broadly, its application has limitations, namely, the damages claimed must still come from the defendant's conduct.

Like *Tarlo*, the damages for which restitution is sought here were caused by someone other than the defendant. In *Tarlo*, the damages were caused by the claimant's husband, because he was the individual who produced the pornographic images later possessed by Tarlo. Here, the damages claimed were caused by Mr. Robinson's brother, because the brother was the individual who drove the vehicle that fatally injured two of the three children. (44:3) Additionally, the conduct which caused the damages claimed in *Tarlo* (the production of the image) preceded Tarlo's criminal act of possessing the image. The same holds true in the present matter where the conduct which actually caused the damages (the fatal hit and run accident caused by Mr. Robinson's brother) preceded Mr. Robinson's act the following day of spray painting the vehicle involved. Both the logic and reasoning expressed by this court in *Tarlo* support a finding that the court erred in ordering Mr. Robinson to pay restitution when the losses sustained were not the result of Mr. Robinson's criminal conduct.

The facts in *State v. Canady* are also instructive. There, the circuit court ordered Canady to pay restitution for damage caused to the rear exit door of a building Canady burglarized. *Canady*, 2000 WI App. 87, ¶ 2. The damage was caused when Canady resisted arrest while having a pry bar in his pocket. *Id.* The arresting officer removed the pry bar from Canady's pocket and tossed it aside. *Id.* The pry bar then struck the exit door and cracked the glass door pane. *Id.* This court agreed that Canady was responsible for the damage caused to the door because,

While damaging the glass door pane may not have been intended or expected on Canady's part, the natural consequences of grabbing for a metal pry bar while resisting arrest was that he would be disarmed. Canady's actions were a substantial factor in causing the resultant damage because, "but for" his burglary and resisting arrest, the property damage would not have occurred. Although [the officer's] tossing of the pry bar may qualify as the immediate or direct cause, ... Canady was only one step removed in the chain of causation. *Canady*, at ¶ 12.

In *Canady*, the court recognized that although Canady himself did not cause the damage claimed, his actions were a "substantial factor" in causing the damage. Specifically, the court noted that "'but for' his burglary and resisting arrest," the glass pane would not have

been damaged. Accordingly, Canady's criminal conduct was a substantial factor in causing the damage claimed – "but for" Canady burglarizing the building and resisting arrest, the damage would not have happened. Applying this logic to Mr. Robinson's set of facts dictates that Mr. Robinson's criminal actions were not a substantial factor in causing the resulting damage – the damage would have happened despite Mr. Robinson's actions, not "but for," Mr. Robinson's criminal conduct.

The charging paragraph of the criminal complaint filed against Mr. Robinson alleged that Mr. Robinson, "with intent to prevent the prosecution of a felon, did alter physical evidence." (2:1) Mr. Robinson was charged with altering physical evidence – he was not charged with being a passenger in a vehicle or with being a bystander who returned to the scene of a crime. Mr. Robinson was specifically charged with spray painting, on October 25, 2019, the vehicle his brother drove at a high rate of speed on October 24, 2019, when his brother failed to stop the vehicle and his brother fatally struck the children crossing the street.

Applying the logic from *Canady* to these facts, it is clear that the fatal accident would have occurred despite Mr. Robinson's presence in the vehicle, not "but for" Mr. Robinson's presence in the vehicle. Nothing in the record indicates that Mr. Robinson took any action whatsoever to promote his brother's driving, to encourage his brother's speeding, or to encourage his brother's fleeing the scene once the accident occurred. As such, there is no action on Mr. Robinson's part that demonstrates he was a substantial cause of the fatal accident; there is no "but for" action attributable to Mr. Robinson on October 24, 2019. Simply being the passenger in a vehicle or simply returning to the scene of an accident is not a crime. Nor is it conduct that substantially caused the damages. The same holds true when *Canady's* logic is applied to Mr. Robinson's criminal conduct.

As noted, Mr. Robinson was charged with spray painting his brother's vehicle on October 25, 2019, to prevent his brother's prosecution for the crime his brother committed. (2:1) The fatal accident occurred on October 24, 2019. Considering the information in the record, that accident would have occurred regardless of whether Mr. Robinson spray painted the vehicle on October 25, 2019, not because Mr. Robinson spray painted the vehicle on October 25, 2019. The circuit court's finding to the contrary is therefore not logical.

In arriving at its decision, the circuit court examined the elements of the crime of aiding a felon found in Wisconsin Jury Instruction 1791. (58:11-15) The court found that the

first element of that crime was “easily met in this case because the defendant was a passenger in the vehicle when the underlying crime occurred.” (58:12) This finding, however, is not logical. The first element of the crime of aiding a felon is that Mr. Robinson’s brother (Daetwan Robinson) was a felon. Mr. Robinson being a passenger in the vehicle driven by his brother is not related to his brother being a felon. As such, the court did not logically apply the facts of the case at hand and erred in its conclusion.

Additionally, in considering whether Mr. Robinson’s brother was a felon, the court examined the elements of his brother’s crime as recommended by Wisconsin Jury Instruction 1791. (58:12-13) The court erred, however, in concluding that such an analysis resulted in Mr. Robinson’s conduct being a substantial factor in the deaths of the children. In this regard, the jury instruction provides the following guidance as it relates to the first element of aiding a felon:

A felon is a person who has committed a crime punishable by imprisonment in the Wisconsin state prisons. (Name of crime) is such a crime and the State must prove by evidence which satisfies you beyond a reasonable doubt that (name of person aided) committed that crime. (Name of crime) is committed by one who LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY. Wis. JI-Criminal 1791 (2015).

The purpose of describing the felonious crime to the jury is not to make the defendant responsible for that crime, but rather to assist the jury in arriving at the conclusion that *the person aided* by the defendant actually engaged in a felony. The plain language of the instruction guides the reader to that purpose. One cannot aid a felon if no felony was committed by the person aided. That is the purpose of incorporating the elements of the felony into the first element of aiding a felon. To use said incorporation of the aided person’s felony to find that the aider is responsible for the aided person’s separate crime is error and contrary to logic. Mr. Robinson’s crime of spray painting his brother’s vehicle is not interconnected with his brother’s act of engaging in a hit and run accident resulting in death, such that Mr. Robinson’s act was a substantial cause of the deaths. To hold otherwise is error.

To be sure, the loss suffered on October 24, 2019, is immense, to say the least, for the victims and their families, and restitution is warranted. The question here is not whether the

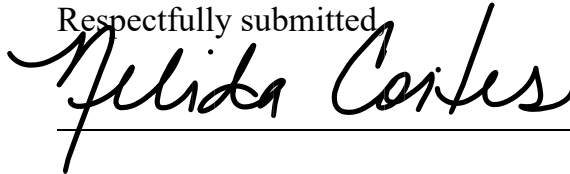
victims were entitled to restitution, but who should be ordered to pay that restitution under the law. As noted in *Tarlo*, “and a defendant should be made liable for, ‘the consequences of the defendant's own conduct,’ ‘not the conduct of others.’” *Paroline v. United States*, —U.S. —, 134 S.Ct. 1710, 1725, 1729, 188 L.Ed.2d 714 (2014). *Tarlo*, at 338. Mr. Robinson should not be liable for his brother’s criminal conduct and the circuit court erred in finding that Mr. Robinson’s conduct was a substantial factor in causing the damages claimed.

CONCLUSION

Counsel submits that the circuit court erred when it ordered Mr. Robinson to pay restitution for his brother’s crimes. Although the court used the correct legal standard, it applied that standard to an illogical interpretation of the facts. Mr. Robinson respectfully requests that the court’s order be reversed and the matter be remanded for proceedings consistent with this court’s ruling.

Dated this 20th day of March, 2024.

Respectfully submitted



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CERTIFICATIONS

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 2,978 words.

Dated this 20th day of March, 2024.



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CERTIFICATE OF COMPLIANCE WITH WIS.
STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 20th day of March, 202.



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