

**FILED**  
**11-17-2023**  
**CLERK OF WISCONSIN**  
**COURT OF APPEALS**

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

APPEAL NOS. 2023AP001592 CR AND 2023AP001593 CR, CONSOLIDATED  
CIRCUIT COURT CASE NOS. 2018CF000925 AND 2019CF000236

---

STATE OF WISCONSIN,  
Plaintiff-Respondent,  
vs.  
DAVID T. WAITS,  
Defendant-Appellant.

---

**BRIEF OF DEFENDANT-APPELLANT**

---

On Appeal from a Judgment of Conviction, the Honorable LaMont K. Jacobson,  
presiding, and a Judgment Denying Postconviction Relief, the Honorable  
LaMont K. Jacobson presiding, Marathon County Circuit Court  
Case Nos. 2018CF000925 and 2019CF000236.

---

KATHLEEN HENRY  
WI Bar No. 1118591  
Dairyland Public Interest Law  
P.O. Box 352  
Madison, WI 53701  
608-213-6857  
khenry@dairylandpublicinterestlaw.com

*Attorney for Defendant-Appellant*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	3
ISSUES PRESENTED.....	4
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	4
STATEMENT OF THE CASE AND FACTS.....	5
STANDARD OF REVIEW .....	8
ARGUMENT .....	8
I. The Circuit Court’s Refusal to Allow Defendant to Introduce Evidence of Contributory Negligence and Evidence of the Failure of the Victim to Have Medical Liability Insurance Violates Wis. Stat. § 973.20(14)(b) and the Court Should Hold a New Hearing on the Amount of Restitution .....	8
II. The Amount of Restitution Awarded is Beyond Defendant’s Capacity to Pay and Amounts to an Excessive Fine in Violation of the 8th Amendment to the United States Constitution and Article I, Sections 1 and 6 of the Wisconsin Constitution.....	11
III. The Circuit Court Erroneously its Discretion in Sentencing by Including in the Award of Restitution Recovery for Certain Medical Expenses and Certain Lost Wages in Violation of Wis. Stat. § 973.20(3) because the Bodily Injuries for which Victim Claimed Compensation and Lost Wages were Not All a Result of the Crime Considered at Sentencing in Violation of Wis. Stat. Section 973.20(3).....	12
IV. The Circuit Court Erroneously its Discretion in Sentencing by Failing to Consider Mr. Waits’ Ability to Pay in Violation of Wis. Stat. § 973.20(13) and this Court Should Reverse the Court Below and Order a New Hearing on the Restitution .....	14
CONCLUSION.....	15
CERTIFICATION AS TO FORM AND LENGTH.....	16
CERTIFICATION AS TO APPENDIX .....	16
APPENDIX (filed separately).....	A101

## TABLE OF AUTHORITIES

<b>CASES</b>	<b>Page</b>
<i>State v. Behnke</i> , 203 Wis.2d 43, 553 N.W.2d 265 (WI App. 1996) .....	10
<i>State v. Canady</i> , 2000 WI App 87, 234 Wis. 2d 261, 610 N.W.2d 147 .....	9
<i>State v. Gallion</i> , 2004 WI 42, 270 Wis.2d 535, 678 N.W.2d 197 .....	8
<i>State v. Knoll</i> , 2000 WI App 135, 237 Wis. 2d 384, 614 N.W.2d 20.....	9
<i>State v. Madlock</i> , 230 Wis.2d 324, 602 N.W.2d 104, 110 (WI App. 1999).....	9, 10
<i>State v. Pope</i> , 107 Wis.2d 726, 321 N.W.2d 359 (WI .App. 1982).....	10, 15
<i>State v. Rodriguez</i> , 205 Wis. 2d 620, 556 N.W.2d 140 (WI App 1996) .....	9
<i>State v. Rouse</i> , 2002 WI App 107, 254 Wis.2d 761, 647 N.W.2d 286.....	12
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998).....	11
 <b>STATUTES</b>	
Wis. Stat. Rule § 809.19(2)(a) .....	16
Wis. Stat. § 809.19(8)(b).....	16
Wis. Stat. § 809.19(8)(bm) .....	16
Wis. Stat. § 809.19(8)(c).....	16
Wis. Stat. § 809.22(2)(a).....	4
Wis. Stat. § 809.22(2)(b).....	4
Wis. Stat. § 809.23(1)(a)1 .....	4
Wis. Stat. § 809.23(3)(a).....	16
Wis. Stat. § 809.23(3)(b).....	16
Wis. Stat. § 895.045(1) .....	9
Wis. Stat. § 973.20(3) .....	4, 12, 14
Wis. Stat. § 973.20(13) .....	4, 14, 15
Wis. Stat. § 973.20(14)(b).....	4, 8, 9, 10
 <b>CONSTITUTIONAL PROVISIONS</b>	
U.S. Const. Amend. 8. ....	4, 11, 12
WI Const. Art. 1, § 1 .....	4, 11, 12
WI Const. Art. 1, § 6.....	4, 11, 12

## ISSUES PRESENTED

*I. Whether the Circuit Court's Refusal to Allow Defendant to Introduce Evidence of Contributory Negligence and Evidence of the Failure of the Victim to Have Medical Liability Insurance Violates Wis. Stat. Section 973.20(14)(b)*

The Circuit Court held it did not violate Wis. Stat. § 973.20(14)(b).

*II. Whether the Amount of Restitution Awarded is Beyond Defendant's Capacity to Pay and Amounts to an Excessive Fine in Violation of the 8th Amendment to the United States Constitution and Article I, Sections 1 and 6 of the Wisconsin Constitution*

The Circuit Court held the amount of restitution does not violate the 8<sup>th</sup> Amendment to the U.S. Constitution and Art. I, §§ 1 and 6 of the Wisconsin Constitution.

*III. Whether the Circuit Court Erroneously its Discretion in Sentencing by Including in the Award of Restitution Recovery for Certain Medical Expenses and Certain Lost Wages in Violation of Wis. Stat. § 973.20(3) because the Bodily Injuries for which Victim Claimed Compensation and Lost Wages were Not All a Result of the Crime Considered at Sentencing in Violation of Wis. Stat. Section 973.20(3).*

The Circuit Court denied this argument.

*IV. Whether the Circuit Court Erroneously its Discretion in Sentencing by Failing to Consider Mr. Waits' Ability to Pay in violation of Wis. Stat. § 973.20(13) and this Court Should Reverse the Court Below and Order a New Hearing on the Restitution*

The Circuit Court denied this argument.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Waits requests oral argument because he believes the case does not meet the criteria under Wis. Stat. § 809.22(2)(a) and (b), in that the restitution claims argue new areas of law. Mr. Waits believes publication is warranted because the 8<sup>th</sup> Amendment claim will enunciate a new rule of law. Wis. Stat. § 809.23(1)(a)1.

## **STATEMENT OF THE CASE AND FACTS**

### **A. Procedural Background Leading to Appeal**

#### *1. Description of the Nature of the Case*

This is an appeal of a Judgment of Conviction and an Order Denying Postconviction Relief entered after a hearing was held on the Postconviction Motion. Mr. Waits challenges the restitution award on several grounds.

#### *2. Procedural Status of the Case Leading up to Appeal and Decision of the Circuit Court*

Mr. Waits pled no contest to one count of Misdemeanor Hit and Run as a Repeater; and no contest to one count of Misdemeanor Bail Jumping as a Repeater, and no contest to one count of Misdemeanor Obstructing an Officer as a Repeater. He was sentenced to two years of probation, but after his probation was revoked, he was sentenced to serve one year initial confinement followed by one year of extended supervision. He was also ordered to pay \$40,959.13 in restitution. He filed a Motion to Modify the Sentence which the Circuit Court denied after a hearing. This appeal follows.

### **B. Statement of Facts**

On August 15, 2018, in case number 18CF925, the State charged Mr. Waits with two counts: Count 1 – Operating a Motor Vehicle Without Owner’s Consent as a Repeater; and Count 2 – Hit and Run, Attended Vehicle, as a Repeater (23AP1592: 1:1).

On March 11, 2019, in case number 19CF236, the State charged Mr. Waits with three counts: Count 1 – Felony Bail Jumping as a Repeater; Count 2 – Misdemeanor Bail Jumping as a Repeater; and Count 3 – Obstructing an Officer as a Repeater (23AP1593: 1:1, 2).

On May 9, 2022, Mr. Waits pled no contest to Count 2 of Case 18CF925 (23AP1592: 111:8) (Note: from this point forward, all documents are cited with the document number in the Index to Appeal No. 23AP1592 unless so indicated). The Court dismissed outright Count 1 of Case 18CF925 (111:10).

At the same hearing, in Case 19CF236, Mr. Waits pled no contest to Count 2 of the Information, Misdemeanor Bail Jumping as a Repeater (111:8); and no contest to Count 3 of the Information, Obstructing an Officer as a Repeater (111:9). The Court dismissed but read-in Count 1 of 19CF236 (111:10). The Court withheld sentence and placed Mr. Waits on probation for two years (111:11), noted there would be a restitution hearing in the future, and gave Mr. Waits zero days of jail credit (111:12).

At the July 11, 2022 hearing on restitution, the victim in case No. 18CF925 (“AG”) requested restitution in the amount of \$37,235.57; or \$16,615.44 in medical bills, \$19,620.13 in lost wages, and \$1,000 for the deductible for automobile repair (81:3; A106). Defense counsel objected to the introduction of the medical records as they discussed injuries not related to the incident which involved Mr. Waits (81:9; 11; A107, 108). Defense counsel objected to the work records on the ground that the doctors told AG to go back to work and she refused (81:14; A109). AG did not carry medical liability insurance on her own car (81:16; A110). AG does not know if her insurance company submitted a claim for property damage and medical coverage to the insurance company that covered the car driven by Mr. Waits (81:17; A111). On the date of the accident AG received a citation from the police for failing to yield the right of way (81:17; A111). AG told the police she had no injury when they arrived at the scene of the accident (81:17; A111). AG’s airbags did not deploy and the passengers in her car were not injured (81:17; A111).

The July 11 restitution hearing was continued until August 10, 2022. At the August 10 hearing on restitution, AG discussed her medical and work records (114; A114). Also at the August 10 hearing, Mr. Waits testified that he has a high school degree and has had factory jobs since then (114:42, 43; A118, 119).

The friend’s car Mr. Waits was driving at the time of the accident was fully insured (114:49; A120). Mr. Waits was 23 years old and had a dependent child at the time of the August 10, 2022 hearing (114:50; A121).

On September 28, 2022, the Court issued an Oral Ruling (112). The Court found that:

The medical records do not specifically find that the victim's injuries were a result of the car crash, certainly the records do indicate that the victim was involved in a motor vehicle accident. That shows up multiple times in those records and seems to accept the fact that that was the origin of the injuries for which she was being treated. (112:3; A124.)

The Court found that Mr. Waits has the ability to find employment and that being a convicted felon "should not be an impediment to finding employment" (112:4; A125). The Court awarded AG \$16,615.44 in medical bills; \$19,620.13 in lost wages; and \$1,000 for the deductible on the car insurance (112:3, 4; A124, 125), for a total of \$37,235.57 (the amount requested), and ordered Mr. Waits to make minimum monthly payments of \$75 (112:4; A125). The total with fees is \$40,959.13 (91).

On October 25, 2022, the State sought to revoke Mr. Waits' probation (93:2). The State alleged that on September 9, 2022, Mr. Waits fled from Law Enforcement in a Motor Vehicle and that on September 20, 2022, Mr. Waits consumed marijuana (93:3).

On December 7, 2022, the Court held a Sentencing After Revocation Hearing (115; A129). The Court sentenced Mr. Waits in Case No. 18CF825 to two years, to be served as one year of Initial Confinement followed by one year of Extended Supervision (115:28-29; A132-133). In case No. 19CF236, the Court sentenced Mr. Waits to two years, to be served as one year of Initial Confinement followed by one year of Extended Supervision, and to be served concurrently to the sentence on 18CF925 (115:28-29; A132-133). The Court awarded 78 days of sentence credit, and found Mr. Waits eligible for the CIP and SAP. (115:29; A133). The Court ordered as a condition of Extended Supervision that Mr. Waits make payments of at least \$100 per month on the restitution award (115:30; A134).

In his postconviction motion, Mr. Waits argued that the Circuit Court erroneously exercised its discretion at sentencing by awarding restitution that includes improper factors and fails to take into account Mr. Waits' inability to make payments of \$100 per month. The Circuit Court denied the motion and this appeal follows (136; A104).

### **STANDARD OF REVIEW**

“A circuit court exercises discretion at sentencing....On appeal, review is limited to determining if discretion was erroneously exercised....When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion....Where the exercise of discretion has been demonstrated, [the appellate court] follows a consistent and strong policy against interference with the discretion of the trial court in passing sentence.” *State v. Gallion*, 2004 WI 42, ¶¶ 17, 18, 270 Wis.2d 535, 678 N.W.2d 197.

### **ARGUMENT**

#### **I. The Court's Refusal to Allow Defendant to Introduce Evidence of Contributory Negligence and Evidence of the Failure of the Victim to Have Medical Liability Insurance Violates Wis. Stat. Section 973.20(14)(b) and the Court Should Hold a New Hearing on the Amount of Restitution**

Wis. Statute § 973.20(14)(b) provides: “The defendant may assert any defense that he or she could raise in a civil action for the loss sought to be compensated.” Defendant attempted to raise defenses of contributory negligence and violation of the law requiring driver's to carry medical insurance but was denied this right. Concerning the issue of contributory negligence, at the restitution hearing, defendant attempted to put on witnesses who would have testified the victim's car was in the right-of-way and that the victim was issued a citation for this violation (81:17; A111). These witnesses would have shown the victim was contributorily negligent.

This is a defense in a civil action as allowed by Wis. Stat. § 895.045(1), which provides that, “Any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering.”

In addition, state law required the victim to have medical liability insurance on her vehicle (81:16; A110). Defendant’s vehicle was insured and the victim believes that insurance company paid nothing for medical bills but does not know why not (81:17; A111). At the continuation of the restitution hearing, the Court held that, “contributory negligence or causation is not an appropriate issue at a restitution hearing” (114:4; A116), citing *State v. Rodriguez*, 205 Wis. 2d 620, 556 N.W.2d 140 (WI App 1996); *State v. Knoll*, 2000 WI App 135, 237 Wis. 2d 384, 614 N.W.2d 20; and *State v. Canady*, 2000 WI App 87, 234 Wis. 2d 261, 610 N.W.2d 147 (114:3; A115).

The Court stated that the, “restitution statute does not allow that issue to be raised at a restitution hearing; that the only defenses would be mitigation set off according to satisfaction which go toward the total amount of restitution as opposed to contributory negligence, so I will find that contributory negligence or causation is not an appropriate issue at a restitution hearing” (114:3, 4; A115, 116).

However, the Court’s ruling violates Wis. Stat. § 973.20(14)(b) which allows people to introduce defenses.

The Wisconsin Supreme Court has confused the issue of bringing defenses with the issue of how evidence is introduced. In *State v. Knoll*, the Supreme Court held:

Second, bringing the issue of contributory negligence into a restitution proceeding, which by its nature is informal and not a full-blown civil trial, is inconsistent with the nature of the proceedings. See *State v. Madlock*, 230 Wis.2d 324, 335, 602 N.W.2d 104, 110 (Ct.App.1999) (citations omitted). If permitted, it would involve the State in what could be an extended civil proceeding which is not envisioned by Wis. Stat. § 973.20 and would defeat the informal nature of the proceedings. Therefore, we conclude that Knoll may not raise Foust’s contributory negligence as a defense to restitution”  
*State v. Knoll*, 2000 WI App 135, ¶ 17, 237 Wis.2d 384, 614 N.W.2d 20.

The Wisconsin Supreme Court failed to reconcile that holding with Wis. Stat. § 973.20(14)(b), which provides for a defendant to assert any defense that he or she could raise in a civil action for the loss sought to be compensated. The Wisconsin Court of Appeals similarly failed to distinguish between introducing rules of evidence and bringing civil defenses.

In *State v. Madlock*, the Court made clear rules of evidence are not required to be followed.

It is also clear, however, that the nature of the hearing is informal. A restitution hearing is not a full-blown civil trial as evidenced by the dispensing of the normal rules of evidence. See *State v. Pope*, 107 Wis.2d 726, 729, 321 N.W.2d 359, 361 (Ct.App.1982); § 973.20(14)(d), stats. Normal rules of practice, procedure and pleading are also waived. See § 973.20(14)(d).  
*State v. Madlock*, 230 Wis.2d 324, 335, 602 N.W.2d 104 (WI App. 1999).

Even though evidentiary rules may be loosened, defenses must still be allowed under the statute.

In *State v. Behnke*, the Court held:

Trial courts are obligated to consider any possible defense that a defendant could raise in a comparable civil case. See § 973.20(14)(b), Stats. Here, Behnke raised two defenses: that he was not liable for the expenses and, if liable, he is only partially so. While he did not cite case law or refer the trial court to any civil jury instructions regarding these defenses, it is readily apparent that Behnke was referring to those defenses set forth in Wis J I—Civil 1722 and 1722A and *Anderson v. Milwaukee Ins.*, 161 Wis.2d 766, 770–71, 468 N.W.2d 766, 768–69 (Ct.App.1991).”  
*State v. Behnke*, 203 Wis.2d 43, 58, 553 N.W.2d 265 (WI App. 1996).

Defendant had witnesses ready to testify about affirmative defenses: “And then Jose Pedraza would testify that he was in the vehicle with Mr. Waits and that Ms. Gagne drove in front of them and Mr. Waits hit the brakes and honked the horn and swerved to try to avoid hitting her” (114:7; A117). However, the Court did not allow Mr. Waits to introduce affirmative defenses in violation of Wis. Stat. § 973.20(14)(b). This Court should order the Circuit Court to hold a new hearing on restitution at which defendant is allowed to introduce defenses.

## **II. The Amount of Restitution Awarded is Beyond Defendant's Capacity to Pay and Amounts to an Excessive Fine in Violation of the 8<sup>th</sup> Amendment to the United States Constitution and Article I, Sections 1 and 6 of the Wisconsin Constitution**

The Court awarded the victim \$40,959.13 in restitution (91). If defendant paid \$100 per month, as ordered, it would take him 409.6 months, or 34.2 years to pay off this debt.

If defendant starts making the payments as soon as he is released, which is highly unlikely as he is unlikely to find employment immediately after being released, he will start making payments at age 24, and complete them at age 58, unless the fees are changed after he completes his Extended Supervision. It would take him 409 months or 34.2 years to pay that amount (140:9; A137). Owing that huge amount makes Mr. Waits feel “stuck in poverty” and he will “never be able to overcome what [he’s] going through now” (140:9; A137). He also feels, “Puzzled, like I don’t know how – that’s 30 years of my life. I don’t know how I could – I don’t know what I could do. I would be – I wouldn’t be able to retire, I wouldn’t be able to pretty much have a life. I don’t understand” (140:10; A138).

The Eighth Amendment to the U.S. Constitution and Article 1, Section 6 of the Wisconsin Constitution state that: “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” This fine is excessive in violation of those constitutional provisions.

The current test for whether the Excessive Fines Clause has been violated is the disproportionality test: “If the amount of the forfeiture is grossly disproportional to the gravity of the defendant’s offense, it is unconstitutional.” *United States v. Bajakajian*, 524 U.S. 321, 337 (1998).

Requiring a 24-year old to pay approximately \$41,000 is grossly disproportional to the offense of a hit and run when air bags did not deploy, the victim was partially at fault, several people suffered no injuries, and the only one to claim injury has an extensive list of pre-existing conditions.

Imposing 34 years of monthly payments on a young man without a college degree and with a felony conviction and who is unlikely to have good job prospects is excessive in violation of these constitutional provisions.

Mr. Waits should not have received such an excessive fine as a sentence as the excessive amount violates the Excessive Fines clauses of the U.S. and Wisconsin Constitutions.

**III. The Circuit Court Erroneously its Discretion in Sentencing by Including in the Award of Restitution Recovery for Certain Medical Expenses and Certain Lost Wages in Violation of Wis. Stat. § 973.20(3) because the Bodily Injuries for which Victim Claimed Compensation and Lost Wages were Not All a Result of the Crime Considered at Sentencing in Violation of Wis. Stat. Section 973.20(3)**

Wis. Stat. § 973.20(3) provides the following:

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 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.

Wisconsin courts must consider whether a restitution award is “reasonable” when they consider whether to issue restitution for lost wages. *State v. Rouse*, 2002 WI App 107, ¶ 16, 254 Wis.2d 761, 647 N.W.2d 286. In addition, a restitution award must comply with Wis. Stat. § 973.20. (*Id.*, fn 5.)

The Court erred in finding that the victim’s pre-existing conditions were not relevant to the award of restitution (81:22; A112). The Court held that, “although the medical records do not specifically find that the victim’s injuries were a result of the car crash, certainly the records do indicate that the victim was involved in a motor vehicle accident” (112:3; A124). The records need to indicate that the treatments Mr. Waits has to pay for were required as a result of Mr. Waits’ actions and they do not so indicate in violation of the statute.

The victim had numerous pre-existing conditions including a long history of lower back pain (76:92). She had degeneration of the lumbosacral intervertebral disc (this is the breakdown of the discs that separate the bones in the spine) (76:94); spinal stenosis (this happens when the space inside the backbone is too small and it puts pressure on the spinal cord and nerves) (76:94); degenerative disc disease lumbar spine (a syndrome in which age-related wear and tear on a spinal disc causes lower back pain) (76:94); spondylosis, lumbar (spondylosis is age-related change of the bones (vertebrae) and discs of the spine - often called degenerative disc disease and osteoarthritis (76:94); tobacco abuse – continuous (Smoking increases risk for degenerative disc disease because it may make one prone to excessive coughing that puts excess pressure on one's discs and strains one's overall spine. This pressure can weaken one's spinal structures and increase the risk for both a herniated disc and degenerative disc disease) (76:94). (See [www.hopkinsmedicine.org](http://www.hopkinsmedicine.org).) The victim went to Westwood Clinic on July 18th and her back pain got worse after the physical therapy she received there (81:26; A113).

Defendant should not be required to pay for any of the victim's medical expenses as she was required to have insurance but did not. In addition, the only medical expenses that might arise from the hit and run would be the victim's initial visit to the doctor on the date of the incident. The accident occurred on July 3, 2018 (1:1).

The victim first went to the doctor on July 3, 2018, and that should be the only medical bill that could possibly be charged to Mr. Waits and it is for \$10,353.60 (76:1; 77:3). There should be a hearing to determine which of those tests ordered on July 3 were ordered solely due to the victim's pre-existing conditions and which were ordered as a result of the car accident. All of the medical bills for visits after July 3 should be removed from the restitution award. Medical bills for treatments after the July 18 clinic visit should definitely be removed as the clinic made the victim worse and that is not the fault of defendant.

The lost wages for time off after July 3 should also be removed from the restitution award.

The victim missed 5.75 hours of regular work, and 1.75 hours of overtime, during the week of July 3 to 7 and those should be the only hours that Mr. Waits would arguably have to reimburse her for (78:3). Those wages total \$121.44 (78:4). Mr. Waits should not have to pay for lost wages beyond those. Mr. Waits should absolutely not have to pay for any wages lost after July 18, when the Westwood Clinic mistreated the victim and caused her injury. He is in no way responsible for that Clinic's mistreatment. The lost wages for the three weeks lost before July 18 total \$2,486.76 (78:3, 4).

It is absurd to make Mr. Waits pay for lost wages for a full 29 weeks of lost time when: 1) the car crash was so minor that the other passengers in both vehicles walked away with no injuries; 2) the airbags did not deploy; 3) the victim had a plethora of pre-existing conditions; 4) the victim admitted to being poorly treated and made worse at a Clinic over which Mr. Waits had no control.

All of these factors show that the wages lost are not a result of the "crime considered at sentencing," but are a result of the victim's other problems. This violates Wis. Stat. § 973.20(3) and most of the lost wages award should be removed from the restitution order.

**IV. The Circuit Court Erroneously its Discretion in Sentencing by Failing to Consider Mr. Waits' Ability to Pay in violation of Wis. Stat. § 973.20(13) and this Court Should Reverse the Court Below and Order a New Hearing on the Restitution**

Mr. Waits testified that he has encountered racist employers in Wausau and will fight an uphill battle to obtain any employment as an African-American and as a felon (140:10, 11; A138, 139). He has been passed over for jobs to white men when Mr. Waits had more experience (140:10, 11; A138, 139). The Circuit Court should have considered this difficulty in imposing restitution.

In determining the amount of restitution, a court must consider the probationer's financial resources and future ability to pay, and cannot establish an amount of restitution so high as to demonstrate a disregard of this obligation.  
*State v. Pope*, 107 Wis.2d 726, 733, 321 N.W.2d 359 (1982).

Wis. Stat. § 973.20(13) requires a court when determining whether to order restitution and the amount of it to consider: “2. The financial resources of the defendant,” “3. The present and future earning ability of the defendant,” and “4. The needs and earning ability of the defendant's dependents.”

The Court did not consider Mr. Waits' claims that it will be difficult or impossible for him to find work as an African-American man in the Wausau area due to prevailing racist attitudes. The Court also did not take into consideration Mr. Waits' needs to provide financial support for his daughter (140:4; 115:19, 23; A136; 130, 131).

This case should be reversed for the same reasons the *Pope* case was reversed.

### CONCLUSION

Wherefore, Mr. Waits respectfully requests this Court to reverse the Circuit Court and remand the matter to that Court and order it to hold a new hearing on the amount of restitution owed; or in the alternative, modify the sentence to decrease the amount of restitution owed.

Dated this 17<sup>th</sup> day of November, 2023.

Respectfully submitted,

Electronically signed by  
KATHLEEN HENRY  
WI Bar No. 1118591  
Dairyland Public Interest Law  
P.O. Box 352  
Madison, WI 53701  
608-213-6857  
khenry@dairylandpublicinterestlaw.com

*Attorney for Defendant-Appellant*

### **CERTIFICATION AS TO FORM AND LENGTH**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 3,987 words.

Dated this 17<sup>th</sup> day of November, 2023.

Electronically signed by  
KATHLEEN HENRY  
WI Bar No. 1118591  
Dairyland Public Interest Law  
P.O. Box 352  
Madison, WI 53701  
608-213-6857  
khenry@dairylandpublicinterestlaw.com

*Attorney for Defendant-Appellant*

### **CERTIFICATION AS TO APPENDIX UNDER WIS. STAT. RULE § 809.19(2)(a)**

I hereby certify that filed with this Brief is an Appendix that complies with Wis. Stat. Rule § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and (4) portions of the record essential to an understand of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 17<sup>th</sup> day of November, 2023.

Electronically signed by  
KATHLEEN HENRY  
WI Bar No. 1118591  
Dairyland Public Interest Law  
P.O. Box 352  
Madison, WI 53701  
608-213-6857  
khenry@dairylandpublicinterestlaw.com

*Attorney for Defendant-Appellant*