

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 17, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1358-CR

Cir. Ct. No. 2003CF1144

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL C. HOFFMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: J.
MAC DAVIS, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Michael C. Hoffman appeals from a restitution order. As we understand Hoffman's appeal, he contends that the trial court erred in imposing restitution after his sentence was completed, that the restitution victim lacks credibility, that the restitution amount is excessive, and that the restitution is beyond his ability to pay. We affirm the order.

¶2 On March 30, 2006, a jury convicted Hoffman of sexual intercourse with a child victim, Tiffany K., contrary to WIS. STAT. § 948.09. A violation of § 948.09 is a Class A misdemeanor, subjecting Hoffman under WIS. STAT. § 939.51(3)(a) to a fine not to exceed \$10,000 and/or imprisonment not to exceed nine months. Hoffman was sentenced to nine months in jail and to pay a fine of \$10,000. The trial court applied a \$5000 bail deposit towards the fine and ordered Hoffman to pay the balance by April 24, 2007, or, in the alternative, serve an additional 150 days in jail.

¶3 At the sentencing hearing on April 24, 2006, Tiffany submitted a restitution request totaling \$42,798.78. A restitution hearing was set for July 28, 2006, and adjourned at the request of the parties due, inter alia, to the amount and nature of the restitution being requested. Hoffman specifically objected to Tiffany's claim for lost wages in the amount of \$37,721.00. A restitution hearing occurred on November 3, 2006.

¶4 The trial court addressed Tiffany's claims in an extensive oral decision and awarded the following restitution to Tiffany:

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

	Claimed	Approved
College classes lost	\$1609.47	\$ 919.70
Unreimbursed medical costs	377.45	375.00
Suburban Counseling	634.30	634.30
Psychologist Ellen Diedrich	640.00	320.00
Lost Wages	<u>32,721.00</u>	<u>16,500.00</u>
TOTALS	\$35,982.22 ²	\$18,749.00

¶5 On November 15, 2006, an Amended Judgment of Conviction and Sentencing was filed reflecting the restitution order of November 3, 2006, and transferring the restitution award to a civil judgment. Hoffman had completed his jail sentence on October 30, 2006, prior to the November 3, 2006 restitution hearing. Hoffman had not, however, paid his full fine, costs, and assessments of \$12,577.00 on November 3, 2006.

¶6 We first address Hoffman’s contention that *State v. Loutsch*, 2003 WI App 16, 259 Wis. 2d 901, 656 N.W.2d 781, precludes the trial court’s authority to order restitution because Hoffman’s ability to pay an appropriate amount of restitution is limited to the term of his already concluded jail sentence, and he had only a fine left to pay which was due in April 2007. In other words, Hoffman insists that *Loutsch* requires that his ability to pay restitution must be limited to the term of his jail sentence and that his release from jail would end his “sentence.” We disagree with Hoffman’s strained and narrow reading of *Loutsch*.

² In her initial itemization Tiffany requested reimbursement for one UW-Waukesha semester at \$2105.01, and for attorney fees in the amount of \$5,089. Those amounts were not addressed by the trial court and Tiffany does not complain. The unreimbursed medical costs of \$142.45 were not included in Tiffany’s initial itemization.

¶7 A resolution of whether the trial court properly determined the amount of Hoffman's restitution and ordered Hoffman to pay requires us to interpret and apply WIS. STAT. § 973.20. The interpretation of a statute and its application to a given set of facts presents a question of law which we review de novo. *State v. Evans*, 2000 WI App 178, ¶12, 238 Wis. 2d 411, 617 N.W.2d 220.

¶8 Loutsch was sentenced to serve a prison term for three years, was released from prison to extended supervision and a consecutive probation term, and was subjected to a restitution determination after he was released from prison. *Loutsch*, 259 Wis. 2d 901, ¶4. *Loutsch*, citing WIS. STAT. § 973.20(1r), relates that “[w]hen restitution is ordered, it becomes a condition of probation, extended supervision or parole, and, after the termination of those, restitution is enforceable in the same manner as a judgment in a civil action by the victim.” *Loutsch*, 259 Wis. 2d 901, ¶24. Hoffman was sentenced to a jail term and fined. Hoffman's restitution, therefore, was not a condition of probation, extended supervision or parole. Hoffman's restitution was ordered with the imposition of a fine, and the holding in *Loutsch* is inapposite.

¶9 Whether or not restitution can be ordered where a fine is imposed presents a question of law that we review de novo. Where several statutory provisions are involved, we consider them together and attempt to harmonize them. *State v. Robinson*, 140 Wis. 2d 673, 677, 412 N.W.2d 535 (Ct. App. 1987). We begin with WIS. STAT. § 973.20(1r), which reads in relevant part:

When imposing a sentence ... for any crime ... the court, *in addition to any other penalty authorized by law*, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing ... unless the court finds substantial reason not to do so and states the reasons on the record Restitution ordered under this section is a condition of probation, extended supervision, or parole served by the defendant for a crime

for which the defendant was convicted. After the termination of probation, extended supervision, or parole, *or if the defendant is not placed on probation, extended supervision, or parole*, restitution ordered under this section is enforceable in the same manner as a judgment in a civil action by the victim named in the order to receive restitution or enforced under ch. 785. (Emphasis added.)

¶10 Under WIS. STAT. § 973.20(1r) restitution is appropriate in addition to any other penalty authorized by law and is not limited to the existence of probation, extended supervision, or parole status being imposed. Section 973.20(12)(a) addresses Hoffman's sentence disposition directly, reading in relevant part:

If the court orders restitution in addition to the payment of fines, costs, fees, and surcharges under ss. 973.05 and 973.06 and ch. 814, it shall set the amount of fines, costs, fees and surcharges in conjunction with the amount of restitution and issue a single order, signed by the judge, covering all of the payments. (Emphasis added.)

¶11 Restitution is authorized, in addition to the imposition of fines under WIS. STAT. § 973.05, for the conviction of any crime. Fines ordered under § 973.05(1) must be paid immediately, or within sixty days from the imposition, unless permission is otherwise embodied in the sentence. However, § 973.05(1m) reads as follows:

If the court orders payment of restitution and a fine and related payments under s. 973.20, the court may authorize a payment period in excess of the limit imposed under sub. (1).

¶12 Hoffman's argument that his sentence was completed with his release from jail, that payment of the outstanding balance of the fine was not a sentence, and that the trial court did not comply with the *Lautsch* directives concerning his ability to pay restitution in an amount reflecting his jail term, runs contrary to a reading of the unambiguous statutory language concerning restitution

being imposed in conjunction with a fine. We must reject Hoffman's argument that the trial court erred in ordering Hoffman to pay restitution.

¶13 In addition, Hoffman submits that the trial court erred in determining that he had the ability to pay the ordered restitution, failed to properly consider his other financial obligations and opportunities, and failed to consider his future ability to pay restitution. The trial court has discretion in deciding on the amount of restitution and in determining whether underlying criminal activity was a substantial factor in causing the restitution damages. *State v. Johnson*, 2002 WI App 166, ¶7, 256 Wis. 2d 871, 649 N.W.2d 284. We review the trial court's exercise of discretion by determining whether the trial court logically interpreted the facts, applied the proper legal standard and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach. *State v. Longmire*, 2004 WI App 90, ¶16, 272 Wis. 2d 759, 681 N.W.2d 534. Our review of the hearing record strongly supports a conclusion that the trial court did not erroneously exercise its discretion in ordering Hoffman to pay restitution, setting the amount of restitution or in holding that Hoffman had the ability to pay the restitution ordered.

¶14 The contentiousness of the restitution hearing is evidenced by the 204 pages of testimony and 14 exhibits received during the procedure. Hoffman begins with the proposition that he should pay no restitution at all because the victim's version of the crime and restitution was incredible, that the victim presented false restitution claims, that the restitution was excessive for a misdemeanor crime, and that the trial court's methodology and reliance on certain evidence was in error. We find Hoffman's arguments without merit and, in some respects, ludicrous.

¶15 A jury convicted Hoffman for the sexual assault of a child, Tiffany, who is the restitution claimant. Hoffman’s brief cites to portions of the jury trial record in arguing that Tiffany lied and misrepresented her status as a victim of the crime. The trial court addressed Hoffman’s contentions as an issue that “has to do with cause” for the restitution; in other words, whether the sexual assault was a substantial factor in the restitution claim. The court held:

[Hoffman’s] theory here is that while this has been termed, a legal violation, they spoke of strict liability. Their theory is basically that the victim of this crime didn’t have any problem with [the sexual assault], [therefore, she] couldn’t have been traumatized with it, [and] it was only later on when somehow it got out that [the victim], basically they’re suggesting to some degree she is exaggerating or play-acting the whole [restitution] thing. I reject that.

From what I have heard of the evidence, and application of commonsense, even if Tiffany had been 18 years old when this happened, and even if she had no initial regrets, it seems to me likely that someone in that situation would likely develop regrets, and have the need for therapy and other kind of damages like this occur.

Now, of course, if Tiffany had been 18 there would be no crime, no tort for what the defendant was convicted for; and, of course, no right to damages.

....

But in this circumstance I don’t find it all surprising that the victim would suffer substantial follow-up consequences that may not have surfaced initially. But would probably for a certain period actually get worse as she realizes the enormity of what happened.

So I reject the defense theory that these things aren’t causally clinked; in the court’s view they were.

¶16 We are satisfied that the trial court properly addressed the facts, applied the “substantial factor” legal standard, and used a rational process to reject

Hoffman's contentions that ordering restitution in favor of Tiffany would not be warranted.

¶17 Lastly, Hoffman complains that the restitution is excessive and beyond his ability to pay. As indicated above, Tiffany initially requested \$42,798.78 in restitution. The trial court, in an exhaustive analysis of claim validity, awarded restitution in the amount of \$18,749. In doing so, the trial court accepted certain claims, reduced some claims, and rejected other claims. Our reading of the record satisfies us that the trial court exercised its discretion in a proper and exemplary fashion in determining the restitution award.

¶18 Hoffman pleads inability to pay restitution in the amount of \$18,749. According to Hoffman, he has demonstrated that he had no cash, almost no assets, a large indebtedness, and that the trial court ignored all of his relevant financial evidence. The trial court heard Hoffman's assessment of his finances and concluded that Hoffman's financial picture supported the restitution order of \$18,749. The court found that Hoffman's business generates substantially more cash flow than attributed to it by his tax evidence, that Hoffman had traveled extensively in contradiction to his tax return information, that he possessed and could liquidate personal assets to meet his financial obligations, that he had accounts receivable, that he paid an employee of his business more money than he made, that he was able to be employed in a more profitable occupation (like his employee), that he could take on part-time work and had no familial reasons not to do so, that he had the ability to borrow cash, that he could prioritize his debts better, and that Hoffman could cut expenses starting with cancelling his cable and internet services.

¶19 As to Hoffman’s future ability to pay restitution, the trial court noted that Hoffman’s financial burden including restitution would be heavy. However, the trial court noted that Hoffman would be able to work in the future and, at some point, he would be in a position to resolve his debts and restore his assets. Based upon its findings, the trial court stated “So, all in all, I concluded his overall financial resources are strong enough to handle this restitution order.”

¶20 In sum, we hold that Hoffman’s reliance on *Loutsch* for relief from the restitution order is misplaced. We further conclude that the trial court did not erroneously exercise its discretion in awarding Tiffany restitution for damages suffered as a result of Hoffman’s criminal act, in setting the amount of restitution, or in determining that the restitution amount is within Hoffman’s ability to pay.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(4).

