

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-1007-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE INTEREST OF MICHAEL E.H.:
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL E.H.,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: EARL J. McMAHON and GERALD C. NICHOL, Judges. *Reversed.*

ROGGENSACK, J.¹ Michael E.H. appeals a dispositional order requiring him to pay \$1,000 in restitution as a condition of supervision following his delinquency adjudication for disorderly conduct and possession of a dangerous weapon. He also appeals orders denying his motions for reconsideration and

¹ This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

modification. Michael contends that the restitution condition of the dispositional order should be reversed because it is undisputed a third party actually inflicted the injuries upon Michael Teal, and because the trial court had no evidence from which it could find Michael, personally, had the financial ability to pay the restitution. The State counters that the appeal should be dismissed as untimely. We conclude that the appeal was timely, and that Teal's injuries resulted in part from Michael's delinquent conduct, but that the trial court did neglect to take evidence to make the requisite finding that Michael, himself, was financially able to pay the \$1,000 restitution. Therefore, we reverse the restitution component of the dispositional order and the order denying reconsideration.

BACKGROUND

This case arises from an incident which occurred on the night of April 4th and the early morning of April 5, 1996. The trouble began with an exchange of verbal insults between Chris C. and a group of teenagers in the neighborhood of a Madison high school. Chris and his girlfriend left the scene of the initial confrontation and went to her residence, located behind the school. The other group of eight or nine people arrived shortly thereafter and taunted Chris to come out and fight.

Chris became frightened by the group's presence in the backyard and called his friend Ben B. to come over and help him. Michael happened to be spending the night at Ben's house and he accompanied Ben. Ben brought along his father's unloaded shotgun.

When Michael and Ben arrived, they observed the group of people in the backyard yelling for Chris. Ben found a shovel in the garage and Michael picked up the shotgun. The two then approached the group, yelling at them to get

out of the backyard, while Michael waved the shotgun around and worked the action on it a couple of times. Chris climbed out through a window, and Ben and Michael observed two men approach Chris with knives. Ben hit one of the men, Michael Teal, over the head with the shovel, causing serious injury.²

The State filed a delinquency petition alleging one count of disorderly conduct and one count of being a child in possession of a dangerous weapon. On June 18, 1996, Michael pled no contest to both charges. On July 15, 1996, the juvenile court adjudged Michael delinquent. The dispositional order, filed July 17, 1996, required Michael to participate in and complete the SPRITE program and the Alternatives to Aggression program; to obey the rules of his parents, school and social worker; to attend school without any unexcused absences; to obey the law; to refrain from the use of drugs and alcohol; not to possess a weapon; to continue in therapy; to avoid unsupervised contact with Chris or Ben; and to pay restitution in the amount of \$1,000 to Teal's medical care providers through the Youth Restitution Program.

On July 23, 1996, Michael promptly filed a motion for reconsideration and revision of the dispositional order on the grounds that disorderly conduct was not one of the crimes for which restitution was authorized under § 949.03(1), STATS., and that under case law, disorderly conduct does not have a victim unless the conduct was specifically directed at a person. The State argued that § 949.03 was inapplicable because the restitution was ordered under

² The shovel blow left a hole in Teal's skull that would require a steel plate to protect, and affected his speech, facial nerves, and ability to walk. While the record did not include an itemization of Teal's medical bills, Teal was uninsured and it is clear that his medical bills exceeded the \$1,000 restitution award.

§ 48.34(5)(a),³ STATS., 1993-94 and the juvenile court had already determined that the facts were sufficient to show that Teal was a victim of Michael's disorderly conduct. The court denied relief on August 30, 1996.

Michael filed notice of his intent to seek postconviction relief on September 6, 1996. Although the appeal itself was not filed within twenty days, this court granted Michael's request for an extension on October 9, 1996. On November 5, 1996, another extension of time was granted for appointing postconviction counsel and ordering transcripts. The last of the transcripts in the appellate record was certified and dated by the court reporter on December 12, 1996 and filed on December 19, 1996. However, through a clerical error, Michael was not served with his copy of the transcript until January 18, 1997.

On March 14, 1997, appellant's counsel filed a second motion for revision of the dispositional order, this time on the additional grounds that Teal could not have been a victim because he was an aggressor, and that the juvenile court had failed to make a finding that Michael, himself, was financially able to pay \$1,000 in restitution. This motion was denied by order on March 20, 1997, without a hearing, on the basis that the restitution award was reasonable and Michael was able to pay the restitution ordered. Counsel then filed a notice of appeal on April 1, 1997.

³ Section 48.34(5), STATS., was repealed by 1995 Act 77 § 248, eff. July 1, 1996. The restitution provision for juveniles who have been adjudged delinquent is now located in § 938.34(5), STATS.

DISCUSSION

Standard of Review.

We will independently determine whether the statutes authorize a restitution order, when the facts are not in dispute. *See State v. Mattes*, 175 Wis.2d 572, 580, 499 N.W.2d 711, 714 (Ct. App. 1993). However, if such an order was permissible, we review whether the circuit court erred in making the restitution order under the erroneous exercise of discretion standard. *State v. Behnke*, 203 Wis.2d 43, 57, 553 N.W.2d 265, 272 (Ct. App. 1996). We analyze a discretionary decision to determine whether the circuit court logically interpreted the facts of record and whether it applied the correct legal standard to those facts. *Id.* at 58, 553 N.W.2d at 272.

We will not reverse a factual finding of the trial court unless it is clearly erroneous. Section 805.17(2), STATS. However, whether a particular set of facts gives rise to a legal defense is a question of law that this court reviews *de novo*. *See Bantz v. Montgomery Estates, Inc.*, 163 Wis.2d 973, 978, 473 N.W.2d 506, 508 (Ct. App. 1991) (whether facts fulfill a particular legal standard is a question of law).

Timeliness of Appeal.

Section 808.04(3), STATS., directs that an appeal from a final disposition under Chapter 48 shall be initiated within the time period specified in § 809.30, STATS. Section 809.30(2)(b) requires that a juvenile file a notice of intent to pursue relief from a dispositional order within twenty days from the entry of the order. Section 809.30(2)(h) requires a juvenile to file either a notice of appeal or a motion for reconsideration within sixty days of the service of the

transcript. *See* § 809.30(1)(a) (defining postconviction relief to include motions for reconsideration under Chapter 48). Sub (j) further provides that an appeal from the original disposition and the order regarding the motion for reconsideration shall be filed within twenty days of the entry of the order on the motion for reconsideration.

When the State filed its brief, it was apparently unaware of the clerical error which had resulted in Michael's late receipt of the final transcript in this case on January 18, 1997. However, supplemental affidavits to the court establish that date. Therefore, Michael's motion for reconsideration on the ground that the trial court had failed to consider Michael's financial ability, which was filed March 14, 1997, but not due until March 19, 1997, was timely, as was this appeal.

Restitution Order.

Section 48.34(5)(a), STATS., 1993-94 authorized the trial court to order a child to make reasonable restitution for "a delinquent act which has resulted in ... actual physical injury to another." However, the statute also required that "[a]ny such order shall include a finding that the child alone is financially able to pay." Section 48.34(5)(a).

Michael initially disputes whether his conduct "resulted" in Teal's injury. First, he argues that Teal was not Michael's victim because Michael's actions were not specifically directed toward Teal; and second, he claims that Teal was not a victim at all because he was an aggressor at the time his injury occurred.

We conclude Michael's first argument is based on too narrow a reading of the statute because, although Michael may not have singled out Teal,

his aggressive conduct was directed at the group of people which included Teal. Nothing in *State v. Vinje*, 201 Wis.2d 98, 548 N.W.2d 118 (Ct. App. 1996), upon which Michael relies for the directed conduct rule, requires that disorderly conduct be directed at *only one* victim. Therefore, the trial court properly concluded that, under the facts of this case, Teal was a victim of Michael's disorderly conduct. However, Michael's second contention requires a closer examination of the proper interpretation and application of the restitution provisions of § 48.34(5), STATS., 1993-94.

When we are asked to apply a statute whose meaning is in dispute, our efforts are directed at determining legislative intent. *Truttschel v. Martin*, 208 Wis.2d 361, 365, 560 N.W.2d 315, 317 (Ct. App. 1997). In so doing, we begin with the plain meaning of the language used in the statute. *Id.* If the language of the statute clearly and unambiguously sets forth the legislative intent, our inquiry ends, and we must apply that language to the facts of the case. However, if the language used in the statute is capable of more than one meaning, we will determine legislative intent from the words of the statute in relation to its context, subject matter, scope, history, and the object which the legislature intended to accomplish. *Id.* We will also look to the common sense meaning of a statute to avoid unreasonable and absurd results. *Kania v. Airborne Freight Corp.*, 99 Wis.2d 746, 766, 300 N.W.2d 63, 71 (1981) (citation omitted).

Upon careful consideration, this court concludes that § 48.34(5), STATS., 1993-94 was ambiguous because it failed to specify the level and immediacy of causation required to determine whether a delinquent act resulted in a particular injury. Thus, reasonable persons could read the statute to authorize restitution only when a delinquent act directly caused the injury, without any intervening events; or whenever a delinquent act played any indirect role in the

injury; or at some level of causation in between. The first, more strict interpretation of the term “resulted,” would limit application of the statute in this case to the person who had actually struck Teal with the shovel, while the latter, more liberal⁴ interpretations could allow restitution for acts which were not sufficient in and of themselves to cause the injury, but which contributed to its occurrence in some manner.

We look then to the subject of restitution in general and the specific scope and object of § 48.34(5), STATS., within the context of the juvenile code.⁵ Restitution serves a rehabilitative function, as well as a compensatory function, by impressing “the full implications of unlawful acts” upon the wrongdoer. *State v. Connelly*, 143 Wis.2d 500, 506, 421 N.W.2d 859, 861-62 (Ct. App. 1988). In the criminal context, “a defendant is responsible for restitution when his or her criminal acts cause harm to the victim, even when the acts of others contributed to the victim's harm as well.” *State v. Rodriguez*, 205 Wis.2d 613, 622-23, 556 N.W.2d 140, 144 (Ct. App. 1996). Similarly, in the civil context, a plaintiff may recover damages for an act which was a cause or substantial factor of an injury, even if it was not the only or most immediate cause. *See* Wis JI--Civil 1500 (citing *Pfeifer v. Standard Gateway Theater*, 262 Wis. 229, 236-38, 55 N.W.2d 29, 33-34 (1952) and *Osborne v. Montgomery*, 203 Wis. 223, 242-43, 234 N.W. 372, 379-80 (1931)).

⁴ A liberal construction is one which applies a statute to a broader range of situations than would a strict construction. *R.W.S. v. State*, 162 Wis.2d 862, 871-72, 471 N.W.2d 16, 20 (1991) (citing Singer, SUTHERLAND STATUTORY CONSTRUCTION § 58.02 (4th ed. 1984)).

⁵ Because the entire juvenile code has been revised, this decision does not address whether the current code would yield the same result.

By strengthening a delinquent child's sense of responsibility, restitution promotes the moral well being and encourages acceptable behavior by the child. *R.W.S. v. State*, 162 Wis.2d 862, 875, 471 N.W.2d 16, 21 (1991). The juvenile code as it existed at the time of the incident in question was to be liberally construed to achieve the best interests of the child. Section 48.01(2),⁶ STATS., 1993-94. Thus, it is incumbent upon this court to construe the restitution provision of § 48.34(a), STATS., 1993-94 in a manner which will maximize the juvenile's understanding of the full consequences of his actions. Therefore, the term "resulted" must be interpreted liberally to include at least that level of causation that would result in civil liability, when the conduct was a substantial factor in causing the harm.

Applying the substantial factor test to the facts of this case defeats Michael's "defense of others" argument. By definition, disorderly conduct is that which would tend to cause a disturbance. Section 947.01, STATS.⁷; *City of Oak Creek v. King*, 148 Wis.2d 532, 540, 436 N.W.2d 285, 288 (1989). It logically follows that when disorderly conduct in fact leads to a confrontation in which someone is injured, the original conduct is a substantial cause of that injury. While Michael recognizes that Teal's subsequent aggression toward Chris fails to excuse Michael's disruptive conduct as a matter of law, he refuses to acknowledge

⁶ 1995 Act 275 § 1m (eff. July 1, 1996) amended § 48.01(1) (intro) to include the best interests provision which was formerly located in § 48.01(2).

⁷ Wisconsin's disorderly conduct statute is straightforward. Section 947.01, STATS., provides:

Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

that both Chris and Teal's conduct could have resulted from the combative atmosphere which Michael and Ben's presence helped foster. The dispositional order satisfied the first part of § 48.34(5)(a), STATS., 1993-94.

The original dispositional order did not, however, rest upon facts that would support a finding that Michael was personally, financially able to pay \$1,000, as is required by the second half of §48.34(5)(a), STATS., 1993-94. Rather, the court ruled that Michael could be referred to the Youth Restitution Program, apparently based upon a judicial policy which had determined \$1,000 was the maximum amount a juvenile sixteen years of age or older could be expected to pay over a year. Then, when it denied his motion for reconsideration, the trial court made a conclusory statement that "the named juvenile is able to pay the restitution ordered." However, there was no testimony of record to support that finding. Therefore, it is clearly erroneous.

CONCLUSION

We conclude that while a restitution order for part of Teal's medical expenses was permissible because Michael's disorderly conduct was directed at a group which included Teal, and Teal's injuries resulted, at least in part, from Michael's aggressive conduct, there was no proof offered from which the trial court could find that Michael, himself, could pay \$1,000 restitution. Therefore, the restitution order is reversed.

By the Court.—Orders reversed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.