

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 12, 2016

Diane M. Fremgen
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. 2015AP780-CR

Cir. Ct. No. 2014CF1079

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JUSTIN ROBERT WHITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Judgment modified and as modified, affirmed; order reversed and cause remanded with directions.*

Before Curley, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Justin Robert White appeals a judgment of conviction entered upon his guilty plea to one count of armed robbery. He also appeals an order denying his motion for postconviction relief. He argues, first,

that the circuit court imposed excessive restitution. We agree. Second, he argues that the circuit court wrongly denied his postconviction motion for a comprehensive order that covers all of his financial obligations in this case and governs the priority of his payments. Again, we agree. Accordingly, we modify the judgment, reverse the order denying postconviction relief, and remand with directions.

BACKGROUND

¶2 According to the criminal complaint, White entered a Wisconsin Vision store in Milwaukee, Wisconsin on February 17, 2014. K.S. was working behind the counter. White waved a gun, demanded money, seized the store's bank deposit envelope, and took the money in the cash register. Police arrested White near the scene of the crime and found money and checks made out to Wisconsin Vision concealed on his person. The State charged White with one count of armed robbery. White pled guilty as charged.

¶3 At sentencing, the circuit court imposed a seven-year term of imprisonment and ordered White to pay costs, disbursements, and various surcharges. The circuit court also ordered that the question of how much, if any, restitution White owed would be determined at a later hearing. The clerk of circuit court entered a judgment of conviction reflecting that White must pay his obligations, including any restitution, "from prison funds not to exceed 25%."

¶4 The matter proceeded to a restitution hearing. Darren Horndasch, president and chief executive officer of Wisconsin Vision, testified that the company sought reimbursement for \$1765.88 in wages paid to K.S. for days in

February 2014, March 2014, and April 2014 that she did not come to work due to the robbery.¹

¶5 Horndasch explained that immediately after the robbery, he spoke to K.S. and told her she could take some time off with pay. He said that K.S. did not work from February 18, 2014, through February 28, 2014, and he presented a letter from K.S.'s health care provider that apparently stated: "during the timeframe of February 17th [sic] and February 28th, [K.S.] was off due to a worker's comp accident."² Horndasch established that Wisconsin Vision paid K.S. a total of \$1015.33 for hours in February 2014 that she did not work due to the robbery.

¶6 Horndasch went on to testify that, due to the robbery, Wisconsin Vision allowed K.S. paid time off for hours she did not work on March 15, 2014 (14.98 hours), March 24, 2014 (15.82 hours), April 12, 2014 (15.53 hours), and April 14, 2014 (6.25 hours). His testimony reflected that the amount Wisconsin Vision paid K.S. for those hours totaled \$750.55. Horndasch agreed that K.S.'s normal work day was six-and-a-half or seven hours, and he said he did not know why she was paid for more than a normal shift on March 15, 2014, March 24, 2014, and April 12, 2014. He also did not know if Wisconsin Vision received documentation showing that K.S. sought counseling in March 2014 or April 2014, and he acknowledged he was "not positive" she received counseling during those months. He explained that Wisconsin Vision paid K.S. for some of her time off

¹ Wisconsin Vision sought reimbursement for additional losses, but the circuit court denied the request. That denial is not at issue here, and we discuss it no further.

² Although the parties and the circuit court discussed the contents of the letter during the restitution hearing, the letter itself is not in the record.

because she “was seeking counseling” but that, as to the balance of the time, “the nature of the reason why she could not work those days [was] she just didn’t feel comfortable coming back to work at that point.”

¶7 At the conclusion of the hearing, the circuit court ordered White to pay restitution of \$1765.88, the total amount Wisconsin Vision sought as reimbursement for wages paid to K.S. The court went on to rule from the bench that the restitution was “payable during [White’s] stay in prison at the rate of a 25 percent wage assignment of all funds received,” and the court then concluded: “that’s the court’s order in this matter. Not only for this sum I’ve ordered to be paid but for any and all sums and surcharges, costs and disbursements, they all get taken out of [White’s] funds received during [his] stay in the state prison.” The clerk of circuit court subsequently signed and entered an amended judgment of conviction that included the original order addressing White’s financial obligations and also included a second provision that White “pay restitution to Wisconsin Vision in the amount of \$1765.88 from prison funds not to exceed 25%.”

¶8 White filed a postconviction motion seeking relief from a portion of the restitution obligation. He did not dispute that Wisconsin Vision is entitled to recover \$1015.33 paid to K.S. for the days she did not work in February 2014 following the robbery. White challenged the balance of the restitution order, however, asserting first that the evidence did not establish a nexus between his criminal conduct and Wisconsin Vision’s damages and, second, that the evidence did not establish the amount of any such damages. Additionally, White argued that the sentencing judge was statutorily required to sign and enter a single order covering all of his financial obligations, reflecting the rate of payment, and clarifying that his restitution obligation should be satisfied before he pays the other

costs and surcharges imposed in this matter. He asked the circuit court to sign and enter such an order on his behalf. The circuit court denied his motion, and he appeals.

DISCUSSION

¶9 We begin with the claim that the circuit court erred in determining the amount of restitution White must pay to Wisconsin Vision. Restitution in criminal cases is governed by WIS. STAT. § 973.20 (2013-14).³ The statute imposes a duty on circuit courts to order restitution for crime victims “unless the court finds a substantial reason not to do so and states the reason on the record.” See § 973.20(1r). To obtain a restitution order, the victim must establish a “causal nexus” between the crime and the disputed damage, see *State v. Canady*, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 600 N.W.2d 147, and must prove the amount of damages sustained as a result of the crime by a preponderance of the evidence, see § 973.20(14)(a). The terms of a restitution order lie in the circuit court’s discretion. *State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). Whether § 973.20 authorizes a circuit court to order restitution under a particular set of facts, however, is a question of law that we review *de novo*. See *State v. Haase*, 2006 WI App 86, ¶5, 293 Wis. 2d 322, 716 N.W.2d 526.

¶10 White offers two arguments in support of his claim for a reduction in the amount of his restitution. We reject one, but agree with the other.

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶11 White first asserts that the record does not establish a causal nexus between the armed robbery and the wages Wisconsin Vision paid K.S. for days she did not work after February 28, 2014. He contends that nothing establishes she “continued to seek counseling or other assistance due to the February 17 robbery.” We are not persuaded by this argument.

¶12 The evidence presented at the restitution hearing was sufficient to support the circuit court’s finding that, because of White’s criminal conduct, Wisconsin Vision paid K.S. for time off in March 2014 and April 2014, regardless of whether the company paid that money to K.S. for days she claimed she was engaged in counseling or for days she claimed she felt too much lingering discomfort to come to work. “The phrase ‘substantial factor’ denotes that the defendant’s conduct has such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense.” *State v. Rash*, 2003 WI App 32, ¶7, 260 Wis. 2d 369, 659 N.W.2d 189 (citation and one set of quotation marks omitted). Here, the facts showed that Wisconsin Vision allowed K.S. paid time off in March 2014 and April 2014 only because of the robbery that White committed.

¶13 White further argues, however, that even if Wisconsin Vision showed a nexus between the robbery and the wages K.S. received for her paid time off in March 2014 and April 2014, nonetheless, the evidence did not prove the specific hours of lost work time and therefore did not support Wisconsin Vision’s payments for those hours. On this point, we agree with White.

¶14 At a restitution hearing, the victim must prove by a preponderance of evidence the amount of damages sustained as a result of the crime. *See State v. Madlock*, 230 Wis. 2d 324, 336, 602 N.W.2d 104 (Ct. App. 1999); WIS. STAT.

§ 973.20(14)(a). Here, the evidence showed that K.S.’s workday usually spanned six-and-a-half or seven hours, but Wisconsin Vision’s records reflected that K.S. missed more than fourteen hours of work on one day at issue in March 2014, more than fifteen hours of work on a second disputed day in March 2014, and more than fifteen hours of work on a disputed day in April 2014. Horndasch was unable to explain why the number of hours listed for missed days attributed to the robbery so substantially exceeded the number of hours K.S. normally worked in a day.

¶15 Horndasch did indicate that he contacted Wisconsin Vision’s chief financial officer to discuss the number of hours reflected on K.S.’s timecard for each day that the robbery caused K.S. to miss work in March 2014 and April 2014. Based on that conversation, Horndasch testified he “presume[d]” that the hours shown for each of those missed work days reflected a payroll administrator’s efforts to pay K.S. for work shifts she missed on multiple days. Further, he “assume[d]” and “surmise[d]” that the hours shown encompassed time that K.S. missed on days for which no entries appear on her timecard.⁴ We must join White in concluding that this testimony represents only speculation. Horndasch’s guesses about the reasons for the number of hours listed on K.S.’s timecard do not constitute evidence of the hours K.S. would have worked but for the robbery. His testimony therefore does not support the amount Wisconsin Vision paid K.S. for

⁴ Horndasch surmised that the hours listed for K.S.’s paid time off might include hours that K.S. did not work on March 16, 2014, and April 13, 2014, because her time card did not have an entry for either day. We take judicial notice that both days were Sundays. See *State ex rel. Shimkus v. Sondalle*, 2000 WI App 262, ¶13, 240 Wis. 2d 310, 622 N.W.2d 763 (court of appeals may take judicial notice of the day on which a date falls). Horndasch testified that Wisconsin Vision is open only six days a week, and K.S.’s time card reflected entries for each of the six days immediately preceding both March 16, 2014, and April 13, 2014.

hours in March 2014 and April 2014 that she did not work due to White's criminal conduct.

¶16 In light of the foregoing, we conclude as a matter of law that Wisconsin Vision failed to establish by a preponderance of the evidence the amount of damages the company sustained in March 2014 and April 2014 due to the robbery. See *Lemke v. Lemke*, 2012 WI App 96, ¶28, 343 Wis. 2d 748, 820 N.W.2d 470 (“Sufficiency of evidence is a question of law.”). The circuit court's contrary conclusion is not supported by the record. Therefore, upon remand, the circuit court shall enter a modified judgment of conviction reflecting restitution of \$1015.33, the amount that Wisconsin Vision paid K.S. for her time off in February 2014 following the robbery.

¶17 We turn to the claim that White is aggrieved by the form of the amended judgment of conviction that governs his financial obligations. The amended judgment, electronically signed by the clerk of circuit court, contains two provisions in regard to those obligations. One provision, first entered before the restitution hearing, reflects that White must pay “costs, surcharges and restitution from prison funds not to exceed 25%.” The other provision, entered after the restitution hearing, reflects that White must pay restitution “in the amount of \$1765.88 from prison funds not to exceed 25%.” White complains that, under the authority of these provisions, the Department of Corrections is presently deducting twenty-five percent of his prison funds for payment of restitution and deducting an additional twenty-five percent of the same funds to pay one of the surcharges assessed at sentencing, namely, the crime victim and witness assistance surcharge mandated by WIS. STAT. § 973.045. White asserts he should be subject to a single order, signed by the sentencing judge, that covers all of his financial obligations

and that requires the payment of restitution first, followed by payments of other costs and surcharges. We agree.

¶18 WISCONSIN STAT. § 973.20 provides, in pertinent part:

(12) (a) 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....

(b) [P]ayments shall be applied first to satisfy the ordered restitution in full, then to pay any fines or surcharges under s. 973.05, then to pay costs, fees, and surcharges under ch. 814 other than attorney fees and finally to reimburse county or state costs of legal representation.

¶19 Neither White nor the State disputes the applicability of WIS. STAT. § 973.20(12) in this case, where the circuit court ordered restitution in addition to other financial obligations. The State nonetheless opposes White’s claim for an order in conformity with the statute.

¶20 The State first asserts that the amended judgment of conviction satisfies the requirement, imposed by WIS. STAT. § 973.20(12)(a), for “a single order signed by the judge.” The amended judgment of conviction, however, addresses White’s financial obligations in two provisions, not one, and the document is electronically signed by a clerk, not “the judge.” We therefore cannot agree that the amended judgment conforms to the requirements of § 973.20(12)(a).

¶21 The State next asserts that the crime victim and witness surcharge falls outside the scope of WIS. STAT. § 973.20(12)(a)-(b) because, says the State, that surcharge is mandated by WIS. STAT. § 973.045, a statute that is not mentioned in § 973.20(12). We agree with White, however, that when the

sentencing court orders restitution coupled with other financial obligations, payment of the crime victim and witness surcharge is governed by WIS. STAT. § 973.05, a statute that § 973.20(12) explicitly encompasses. *See* § 973.20(12)(b) (requiring application of payments after restitution to “any fines or surcharges under s. 973.05”). Section 973.05 provides, in pertinent part: “[p]ayments under this section shall be applied as applicable in the following order: ... [t]o payment of the crime victim and witness surcharge imposed on or after July 2, 2013, until paid in full.” *See* § 973.05(2m)(dr).

¶22 The State goes on to argue that, in its view, the Department of Corrections is properly making two deductions from each deposit to White’s prison account and putting the money towards the financial obligations imposed at sentencing. The question before us, however, is not whether the Department of Corrections is proceeding correctly in light of the current record. Rather, we are asked to determine the statutory requirements for an order entered when the sentencing court imposes restitution along with the other financial obligations at issue here. We conclude that WIS. STAT. § 973.20(12)(a) unambiguously requires the judge to sign and enter a single order covering all of the payments and that § 973.20(12)(b) directs the sequence in which the payments should be applied.

¶23 Therefore, upon remand the circuit court shall, in addition to entering an amended judgment of conviction, sign and enter a single order under WIS. STAT. § 973.20(12)(a), covering all of White’s financial obligations in this case. The order shall make clear that it supersedes any prior orders addressing those financial obligations, that White is subject to a deduction for those obligations not to exceed twenty-five percent of the funds he receives in prison, and that his payments shall be applied in accordance with § 973.20(12)(b).

By the Court.—Judgment modified and as modified, affirmed; order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

