COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP1610-CR **Cir. Ct. No. 2016CT1002**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID M. LARSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed.*

¶1 REILLY, P.J.[1] David M. Larson appeals from a judgment of conviction for operating while intoxicated (OWI), fourth offense. A hit-and-run

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

charge was dismissed and read in as part of Larson's no contest plea to the OWI. The circuit court ordered restitution of $2773 to the victim. Larson argues that he should not have been ordered to pay restitution as the accident was not his fault. We affirm the decision of the circuit court.

¶2 On November 27, 2016, R.A.C. was merging into a traffic circle when the accident occurred. The collision was witnessed by Winnebago County Sheriff's Deputy Kyle Schroeder, who checked on the drivers and called in the accident. Larson and R.A.C. agreed to move their vehicles to a different location away from traffic, but Larson never arrived at the designated location. Larson was later arrested and charged with OWI and hit-and-run,[2] and R.A.C. was cited for failure to yield right-of-way.

¶3 Larson pled no contest to OWI, fourth offense, in return for the hit-and-run charge being dismissed and read in. Larson was sentenced to two years' probation with conditional jail time, a $2600 fine, license revocation, and ignition interlock. R.A.C. requested $3092.25 in restitution for chiropractic bills, damage to his vehicle, and towing costs. Larson contested the restitution and requested a hearing. After hearing testimony, the court ordered Larson to pay $2773 in restitution.[3] Larson appeals.

[2] The charges were later amended to add a count of operating with a prohibited alcohol concentration (PAC).

[3] This amount included $1836 for the vehicle, $685 in chiropractic care, and a ten percent restitution surcharge. The court did not find a sufficient nexus between the towing costs and the accident as the towing did not occur until R.A.C. had driven the vehicle another 1000 miles after the date of the accident.

¶4 Restitution "shall" be ordered "to any victim of a crime considered at sentencing." WIS. STAT. § 973.20(1r). "Whether the trial court is authorized to order restitution pursuant to WIS. STAT. § 973.20 under a certain set of facts presents a question of law that we review *de novo*." ***State v. Lee***, 2008 WI App 185, ¶7, 314 Wis. 2d 764, 762 N.W.2d 431. Where a defendant challenges the calculation of criminal restitution, we review the decision of the circuit court for an erroneous exercise of discretion. ***State v. Canady***, 2000 WI App 87, ¶6, 234 Wis. 2d 261, 610 N.W.2d 147.

¶5 A "[c]rime considered at sentencing" is defined as "any crime for which the defendant was convicted and any read-in crime." WIS. STAT. § 973.20(1g). The mandatory language ("shall") contained in § 973.20(1r) "creates a presumption that restitution will be ordered in criminal cases," absent a substantial reason. ***State v. Gibson***, 2012 WI App 103, ¶10, 344 Wis. 2d 220, 822 N.W.2d 300. The restitution statute "reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." ***State v. Kennedy***, 190 Wis. 2d 252, 258, 528 N.W.2d 9 (Ct. App. 1994). To that end, "the restitution statute should be interpreted broadly and liberally in order to allow victims to recover their losses as a result of a defendant's criminal conduct." ***Gibson***, 344 Wis. 2d 220, ¶10. The victim has the burden of demonstrating his or her loss by a preponderance of the evidence. Sec. 973.20(14)(a).

¶6 Larson argues that "[j]ust because the crimes considered at sentencing—OWI and hit-and-run—involved the use of a vehicle does not mean that Larson's criminal conduct was a substantial factor in the damage to R.A.C.'s vehicle or his chiropractic bills." Larson's argument rests on his position that R.A.C. alone caused the accident as testimony demonstrated that "R.A.C. rolled

through the yield sign" and R.A.C. "misunder[stood] the traffic circle itself."[4] According to Larson, "[a]ll indications are instead that the accident would have occurred had Larson not been driving under the influence."

¶7 We conclude that the circuit court properly ordered restitution to R.A.C. for the injuries and damages he sustained. The term "crime" as it is utilized in the restitution statute encompasses all facts and reasonable inferences concerning the defendant's activity related to the "crime" for which the defendant was convicted as well as any "read-in crimes." ***State v. Madlock***, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999). In ***State v. Rodriguez***, 205 Wis. 2d 620, 623, 556 N.W.2d 140 (Ct. App. 1996), for example, Rodriguez was convicted after a no contest plea to hit-and-run in an accident causing death. He was ordered to pay restitution, which he contested, arguing that he was not liable for restitution because his only "criminal act"—fleeing—was not the "cause of the death of the victim." ***Id.*** at 624. This court disagreed, reasoning that "[u]nder the restitution statute, the sentencing court takes a defendant's entire course of conduct into consideration. The restitution statute does not empower the court to break down the defendant's conduct into its constituent parts and ascertain whether one or more parts were a cause of the victim's damages." ***Id.*** at 627. This court concluded that in pleading no contest, Rodriguez admitted all of the elements of the crime. ***Id.*** at 628.

> The prohibited conduct consisted of operating a vehicle which was involved in an accident and then leaving the scene of the accident before performing specific statutory

[4] We note that the circuit court based its decision partially on its conclusion that under ***State v. Knoll***, 2000 WI App 135, ¶17, 237 Wis. 2d 384, 614 N.W.2d 20, contributory negligence is not a defense with regard to restitution. We do not reach this issue as we conclude that WIS. STAT. § 973.20 sufficiently instructs this issue.

> duties. Although one element on its own may not constitute a crime, when all of these elements are proven or admitted, then a crime has been committed and restitution may be ordered.

Id. at 629.

¶8 R.A.C. was a victim of Larson's crimes considered at sentencing under WIS. STAT. § 973.20(1r). Larson was initially charged with OWI, fourth offense, and hit-and-run. Pursuant to a plea agreement, the hit-and-run was a read-in charge. Larson drove his vehicle while intoxicated; under the influence of an intoxicant means that "the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise clear judgment and steady hand necessary to handle and control a motor vehicle." WIS JI—CRIMINAL 2669. An accident occurred, which resulted in injuries to R.A.C. and damages to his vehicle. Larson fled the accident scene and was charged with a hit-and-run—a crime clearly connected with the damage as the crime requires that "[t]he defendant operated a vehicle involved in an accident on a highway" and "[t]he accident resulted in (injury to any person) (death of any person) (damage to a vehicle driven or attended by any person)." *See* WIS JI—CRIMINAL 2670. We are not permitted to "break down the defendant's conduct into its constituent parts" and we must instead consider "all facts and reasonable inferences concerning the defendant's activity related to the 'crime' for which the defendant was convicted." *See* ***Rodriguez***, 205 Wis. 2d at 627; ***Madlock***, 230 Wis. 2d at 333. Accordingly, the circuit court properly ordered Larson to pay restitution to R.A.C.[5]

[5] Although Larson does not challenge the amount of restitution, we note that the circuit court appropriately exercised its discretion in the amount ordered. The court heard testimony from R.A.C. regarding his purported losses, including damage to his vehicle and chiropractic bills for pain in his shoulders and neck, and made a reasonable decision on the amount of the restitution ordered based on the facts of the case and the law.

By the Court.—Judgment affirmed.

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