COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1881-FT **Cir. Ct. No. 2012JV417**

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

IN THE INTEREST OF LANCE F., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LANCE F.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: MICHAEL J. PIONTEK, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

¶1 GUNDRUM, J.[1] Lance F. appeals from that portion of a dispositional order directing him to pay restitution for a missing iPod. For the following reasons, we reverse the circuit court's order of restitution relating to the iPod and remand for entry of a modified order.

Background

¶2 The State filed a WIS. STAT. ch. 938 petition of delinquency against Lance, alleging that he committed substantial battery, disorderly conduct, and physical abuse of a child when he and two other boys initiated a physical confrontation with fellow student David M., in which David was injured. As stated in the petition, the day before the altercation, David permitted Lance to borrow his iPod. At the end of school that day, David asked Lance to return the iPod and Lance told him that he had left it in a classroom. The next day, David again asked Lance for the iPod, but Lance told him he did not have it. David heard from other boys that Lance had sold the iPod. David confronted Lance about this, and Lance denied selling the iPod and stated that someone else must have taken it. Lance indicated that if David was going to accuse him of taking the iPod, he would fight David. On the way home from school, Lance and two other boys attacked David, resulting in injury to David, including cuts to his face and a fractured wrist.

¶3 The State filed the delinquency petition, and Lance ultimately entered an admission to an amended count of misdemeanor battery. The disorderly conduct charge was dismissed but read in, and the physical abuse to a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

child charge was dismissed outright. At a subsequent dispositional hearing, the circuit court adjudged Lance delinquent and placed him on supervision.

¶4 At the dispositional hearing, David requested restitution for medical bills and the missing iPod, headphones, and case. The following exchange ensued between the court and the State related to restitution for the iPod:

> THE COURT: I'm going to withhold restitution and order a restitution hearing except I make a finding today that you took the iPad [sic] and you owe him for the iPad [sic] …. Mr. Barta [assistant district attorney], out of these attachments, to the school records, there is an iPod touch, $40.99, and one for $299.99. Is that related to the iPod?
>
> MR. BARTA: Judge, there is no theft charge here. There is no criminal damage to property charge, there is nothing here relating to the iPod. We can't prove that he stole the iPod. We didn't—We didn't charge that.
>
> THE COURT: They can appeal it. I'm ordering him to pay for the iPod.
>
> MR. BARTA: I'm not going to take an appeal, Your Honor. I'm just saying.
>
> THE COURT: Appeal it if you don't like my ruling. My question to you is are those the charges relating to the iPod?
>
> MR. BARTA: I do not know, Your Honor. This is the first I've seen of this.

¶5 At a subsequent restitution hearing, Lance's counsel indicated Lance's willingness to pay for David's medical bills but moved the court to reconsider its prior ruling regarding paying restitution for the iPod. Counsel stated: "My client wasn't convicted of stealing the iPod. He was suspected of it, but he wasn't even charged. And, quite frankly, I think that that was an improper order under the circumstances." The State added:

> I have no objection to the motion to reconsider. I frankly agree that there was no charge related to theft, and

> there was an allegation that there was an underlying theft that was motivation for the fight. But I didn't have any proof of that. And there was no charge for that.
>
> So that's my position.

The court concluded that it could order restitution for the iPod because it found that Lance had taken the iPod from David and not returned it. Lance appeals only the order of restitution related to the iPod.

Discussion

¶6 Lance's sole argument on appeal is that the circuit court lacked authority to order restitution for the iPod, headphones, and case because the delinquent act for which he was adjudicated was the battery with the disorderly conduct charge read in, Lance's conduct related to these charges occurred *after* the alleged loss of the iPod items and thus in no way contributed to the loss, and no theft or damage to property charges were brought in relation to the items. The State modifies its position from that which it took before the circuit court and now contends the circuit court does have the authority to order restitution for the iPod and related items. A question of judicial authority such as this raises an issue of law that we review de novo. ***R.W.S. v. State***, 162 Wis. 2d 862, 869, 471 N.W.2d 16 (1991). Although we, like the circuit court, are troubled by Lance's actions related to this entire matter, we must conclude that he is correct on the law.

¶7 Our supreme court's decision in ***R.W.S.*** provides guidance. In that case, the State filed two juvenile delinquency petitions against R.W.S., one alleging he burglarized his parents' home on July 1, 1988—taking liquor and stereo equipment—and the other alleging he burglarized the home on June 29 or 30, 1988—taking various items, including $900 cash. ***Id.*** at 868. At the dispositional hearing, R.W.S. acknowledged he burglarized the home on July 1

and stole the liquor and stereo equipment, and also acknowledged he burglarized the home on June 29 or 30, but denied stealing the $900. ***Id.*** R.W.S. entered an admission to the first petition; the second petition, related to the $900, was dismissed but read in. ***Id.*** Following a restitution hearing, the circuit court found that the State had proven that R.W.S. had stolen the $900 and ordered R.W.S. to pay that amount in addition to other restitution. ***Id.*** at 869.

¶8 On appeal to the supreme court, R.W.S. argued that the circuit court lacked authority to order him to pay restitution related to the delinquency petition that had been dismissed but read in. ***Id.*** As the ***R.W.S.*** court states it, R.W.S. contended the language of WIS. STAT. § 48.34(5)(a) (eff. Aug. 1, 1987)[2]—the predecessor to WIS. STAT. § 938.34(5)(a)—and other statutory provisions limited restitution to loss "caused by the act for which the child has been adjudged delinquent." ***R.W.S.***, 162 Wis. 2d at 870. The court ultimately held that because R.W.S. had been adjudicated delinquent on the charge in the first burglary petition, had admitted to the related burglary offense in the second petition (although he specifically denied taking the $900), and had agreed that the second petition would be read in "in return for the State's promise not to prosecute based on that offense," the circuit court had the authority to order restitution for the $900. ***Id.*** at 872, 876. Key to the court's holding was the fact R.W.S. had admitted to the burglary in the second petition and that offense actually had been read in as part of the plea agreement. ***Id.*** at 872-74, 876-78.

[2] WISCONSIN STAT. § 48.34(5) was renumbered (5)(a) and amended in the 1987-88 budget bill. *See* 1987 Wis. Act 27, § 880p. The relevant language of WIS. STAT. § 938.34(5)(a) allows for restitution "if the juvenile is found to have committed a delinquent act that resulted in damage to the property of another." Section 48.34(5)(a) (eff. Aug. 1, 1987) is materially identical to this language in all respects relevant to this case.

¶9 Here, Lance was never charged with theft of the iPod, he never admitted to stealing or selling the iPod, and there was no offense read in which stemmed from the alleged theft. Indeed, the State admitted before the circuit court that it did not have enough evidence to file a petition related to the alleged theft of the iPod. That said, the circuit court nonetheless properly could have ordered restitution for the iPod if it could reasonably be said that the offense for which Lance was adjudicated—the battery—somehow caused the loss of the iPod. For example, if the iPod had been on either Lance's or David's person at the time of the battery and had been broken during the battery, restitution for such damage properly could have been ordered. It is undisputed, however, that the battery in no way contributed to the loss of the iPod. The circuit court had no more authority to order restitution for the iPod than it would have had to order restitution for a new shirt if Lance had torn David's shirt two months earlier and such damage was shown to have been part of the tension between the boys that led up to the battery.

¶10 Because it is appropriate for us to draw an analogy with similar adult criminal provisions, *see* ***id.*** at 874-75, we note similarities between this case and ***State v. Piotter***, No. 2009AP2005, unpublished slip op. (WI App Jan. 26, 2010). In ***Piotter***, a condominium association was the victim of Piotter's unlawful entry. ***Id.***, ¶2. In addition to ordering restitution for the association's cost in upgrading to a more secure locking system following the unlawful entry for which Piotter was charged and convicted, the circuit court also ordered Piotter to pay restitution for the cost of a different lock the association installed *prior* to the unlawful entry for which Piotter was convicted. ***Id.*** The basis for the restitution related to the earlier lock was the association president's testimony that the association had incurred that earlier cost in response to a prior, uncharged incident in which Piotter entered the premises without authorization. ***Id.***, ¶5. We reversed, summarily concluding

that restitution was not authorized for the cost of the initial lock related to the earlier entry because there was neither a conviction nor read-in charge related to that entry. ***Id.***, ¶¶3, 5. Likewise here, there is neither an adjudication of delinquency nor a read-in offense for the alleged theft of the iPod.

¶11 The State raises fears that the position advocated by Lance

> would have the court deny a victim of a crime against the person restitution for property damaged *in the assault* because there is no property-based crime; a battery victim whose eye glasses get destroyed *as an offender punches her in the face*, a battered child whose school books get destroyed *as the result of battery*, or a rape victim whose clothes are destroyed *during the assault* would want for restitution. (Emphasis added.)

Our holding today creates no potential for such effects. In each hypothetical scenario identified by the State, the property damage at issue occurs *as a result of* and/or *in the course of* the offense for which the person is found guilty or delinquent. In the case before us, the iPod was allegedly sold by Lance prior to the battery. The alleged theft may have precipitated the battery, but it is undisputed that the iPod was not lost in the course of the battery nor did the battery in any way cause the theft or loss of the iPod.

¶12 We must also point out that at the dispositional hearing, the disorderly conduct charge was treated as a read-in offense. Neither party contends that the disorderly conduct charge related to the loss of the iPod. According to the record, it appears instead that this charge related solely to the altercation between Lance and David, not to the alleged theft of the iPod. This is an important distinction because had the read-in disorderly conduct charge related to the loss of the iPod, restitution for the iPod would have been properly ordered in this case. *See* ***id.***

¶13 Based on the foregoing, we conclude that the circuit court lacked the authority to order restitution for the iPod. Lance had not been adjudicated delinquent of a charge for the loss of the iPod, there was no charge read in for the alleged theft, and the delinquent conduct underlying Lance's adjudication on the battery and the read-in disorderly conduct charge did not cause the loss of the iPod. Accordingly, we reverse that portion of the court's order requiring Lance to pay $363.48 restitution for the iPod, headphones, and case, and remand for entry of a modified order consistent with this opinion.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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