COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1794-CR **Cir. Ct. No. 2013CM6**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD J. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

¶1 HRUZ, J.[1] Richard Nelson appeals a judgment convicting him of one count of disorderly conduct, domestic abuse, and an order denying postconviction relief. Nelson argues the circuit court erroneously exercised its

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

discretion by ordering him to pay the victim's medical expenses as restitution. He observes that, although the jury found him guilty of disorderly conduct, it acquitted him of two counts of battery. Given this verdict, he argues the jury must have rejected the victim's testimony that he punched her and pushed her to the ground, and, accordingly, the disorderly conduct conviction must have been based on other acts that did not involve physical contact. Therefore, Nelson argues, the victim failed to prove there was a causal nexus between her medical expenses and the crime considered at sentencing. He also argues the victim failed to prove the medical expenses were necessary.

¶2 We conclude the circuit court properly exercised its discretion by including the victim's medical expenses in the restitution award, despite Nelson's acquittal on the battery charges, because a causal connection existed between the medical expenses and Nelson's disorderly conduct conviction. We also conclude the victim met her burden to prove the medical expenses were necessary. We therefore affirm.

BACKGROUND

¶3 Nelson was charged with two counts of battery, domestic abuse, and one count of disorderly conduct, domestic abuse, after his then-girlfriend, Cynthia B., accused him of punching her and pushing her to the floor during an argument at their apartment on December 28, 2012.

¶4 At trial, Cynthia testified Nelson picked her up from work on December 28, dropped her off at their apartment, and then left to go shopping. In the apartment, Cynthia found a note from Nelson stating he was upset about emails he found that Cynthia had sent to an ex-boyfriend. Cynthia and Nelson began arguing about the emails via text message. They continued discussing the

emails in person after Nelson returned to the apartment. They ate dinner, and Cynthia then took some prescribed pain medication and fell asleep on the couch at about 7:30 p.m.

¶5 Cynthia testified she awoke to find Nelson "standing over [her] screaming [her] name." She further testified that she got up and went onto the apartment's balcony to smoke a cigarette. Nelson followed her, grabbed her by the jacket, and punched her in the face. He then pushed her up against the balcony railing and threatened to push her over the edge. At some point while they were on the balcony, Nelson punched her in the face a second time.

¶6 The next thing Cynthia remembered was being back in the living room, where Nelson pushed her down to the floor twice. Nelson then picked her up by her jacket and walked her into the bedroom. He told her to "stay there or [she] would get hit again." He left the room and returned with a steak knife in his hand. Cynthia testified seeing the knife caused her to urinate on herself. She asked Nelson what the knife was for, and he responded, "Well, it's either for you or it's for me." After that, Nelson calmed down somewhat and told Cynthia they were going to "sit and talk this out." He allowed Cynthia to go into the closet to change her clothes. Shortly thereafter, Cynthia texted her daughter and asked to be picked up from the apartment.

¶7 Cynthia's daughter confirmed at trial that she picked her mother up from the apartment on December 28, 2012. She testified there was blood on Cynthia's cheek that appeared to be coming from her mouth. Cynthia's face was swollen, and it looked like she had been crying. Cynthia told her daughter that Nelson had hit her. Cynthia's daughter then drove Cynthia to a local hospital.

¶8 Brown County sheriff's deputy Alan Snover testified he spoke with Cynthia in the emergency room. He observed "a little bit of dried blood at the right side of her mouth, and the left cheekbone area was red and appeared to be puffier, a little swelling." Based on his experience, Snover testified these injuries were consistent with "getting hit in the face."

¶9 Nelson testified in his own defense. He stated his relationship with Cynthia was "very rocky," and he moved out of their apartment for several days shortly before Christmas in 2012. However, he had moved back into the apartment by December 28. On the morning of December 28, after dropping Cynthia off at work, Nelson opened his laptop and found emails from Cynthia to an ex-boyfriend that she "had left open on the computer[.]" He left Cynthia a note stating he did not understand "why she would do that[.]" He later picked Cynthia up from work, dropped her off at the apartment, and went grocery shopping. He and Cynthia texted about the emails while he was at the grocery store.

¶10 After Nelson returned from the store, he and Cynthia ate dinner, and she fell asleep on the couch. Some time later, Nelson woke Cynthia because she did not look comfortable on the couch and he thought she would be more comfortable in bed. Cynthia was upset that Nelson had woken her. Nelson then decided he was going to move out again. He began packing his clothes, which upset Cynthia further.

¶11 After packing four or five bags, Nelson went onto the apartment's balcony to smoke a cigarette. Cynthia followed him outside, and he told her that he was leaving and was not coming back. When Nelson turned to walk back into the apartment, Cynthia reached out and grabbed him, scratching his face in the process. Nelson's booking photo, which was taken the following morning,

showed two scratch marks on his right cheek. After Cynthia grabbed Nelson, he continued walking into the apartment. She released her hold on him and fell down on the balcony. Nelson helped her up and walked her into the apartment. Cynthia subsequently left the apartment. Nelson denied punching or pushing Cynthia at any point that evening.

¶12 The jury convicted Nelson of the disorderly conduct count but acquitted him of the two battery counts. The circuit court accepted the jury's verdict and proceeded directly to sentencing. After the parties made their sentencing arguments, the court asked the State whether it was still seeking restitution in the amounts listed on a form filed several months earlier. The State informed the court it was seeking only the first two items listed on the form: medical expenses of $3588.38, and a lost security deposit of $550.

¶13 Nelson objected to the circuit court awarding Cynthia's medical expenses as restitution.[2] He argued the medical expenses were necessarily related to the battery counts, of which he had been acquitted, rather than the disorderly conduct count. The circuit court rejected Nelson's argument, reasoning, "[T]he jurors in this case did decide that [Nelson] was clearly the aggressor and that he met the elements of disorderly conduct which include abusive behavior and that abusive behavior resulted in the victim going to the hospital and incurring those medical bills." The court further stated Nelson was "convicted of a crime[,] and as

[2] Nelson also argued the court could not award the security deposit as restitution. However, he has abandoned that argument on appeal. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (An issue raised in the circuit court but not raised on appeal is deemed abandoned.).

a result of that crime [Cynthia] incurred hospital expenses." The court therefore included Cynthia's medical expenses in the restitution award.

¶14 Nelson moved for postconviction relief, again arguing the circuit court erred by requiring him to pay Cynthia's medical expenses as restitution. The court denied Nelson's motion, following a nonevidentiary hearing. In support of its decision, the court stated, "[T]he facts are he was found guilty of the disorderly conduct which includes violent and abusive behavior. And I believe the restitution is attributable to the violent and abusive behavior of the disorderly conduct he was convicted of[.]" Nelson now appeals.

DISCUSSION

¶15 WISCONSIN STAT. § 973.20 governs restitution in criminal cases. ***State v. Longmire***, 2004 WI App 90, ¶11, 272 Wis. 2d 759, 681 N.W.2d 534. WISCONSIN STAT. § 973.20(1r) provides, in relevant part:

> When imposing sentence or ordering probation for a crime involving conduct that constitutes domestic abuse under s. 813.12(1)(am) or 968.075(1)(a) for which the defendant was convicted or that was considered at sentencing, 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[.]

The term "crime considered at sentencing" is defined as "any crime for which the defendant was convicted and any read-in crime." WIS. STAT. § 973.20(1g)(a).

¶16 Whether a court has authority to order restitution under WIS. STAT. § 973.20 on a particular set of facts is a question of law that we review independently. ***State v. Lee***, 2008 WI App 185, ¶7, 314 Wis. 2d 764, 762 N.W.2d 431. The primary purpose of restitution is to compensate the victim. ***State v. Madlock***, 230 Wis. 2d 324, 332, 602 N.W.2d 104 (Ct. App. 1999). As such, we

must construe WIS. STAT. § 973.20 "'broadly and liberally in order to allow victims to recover their losses as a result of a defendant's criminal conduct.'" ***Madlock***, 230 Wis. 2d at 332 (quoted source omitted). Restitution "is the rule and not the exception and … should be ordered whenever warranted." ***Id.*** at 333. However, "[t]he burden of demonstrating by the preponderance of the evidence the amount of loss sustained by a victim as a result of a crime considered at sentencing is on the victim." WIS. STAT. § 973.20(14)(a).

¶17 "Case law arising under the restitution statute informs us that there are two components to the question of whether restitution can be ordered." ***State v. Hoseman***, 2011 WI App 88, ¶16, 334 Wis. 2d 415, 799 N.W.2d 479. First, the claimant must be a direct victim of a crime considered at sentencing. ***Id.*** Second, there must be a "causal connection between the defendant's conduct and harm suffered by the claimant." ***Id.*** The circuit court has discretion to determine whether a causal connection exists. ***State v. Johnson***, 2002 WI App 166, ¶7, 256 Wis. 2d 871, 649 N.W.2d 284. We will affirm the court's discretionary determination if it 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. ***Id.***

¶18 Here, Nelson argues the circuit court erroneously exercised its discretion by including Cynthia's medical expenses in the restitution award because Cynthia failed to prove there was a causal connection between the

expenses and the crime considered at sentencing—disorderly conduct.[3] To establish a causal connection, a victim must show that the defendant's "criminal activity" was a "substantial factor" in causing damage. ***State v. Canady***, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147 (quoted source omitted). In other words, the victim must show that the defendant's actions were the precipitating cause of the injury, and that the harm resulted from the natural consequences of the defendant's actions. ***Id.*** When determining whether a causal connection exists, a court may consider "a defendant's entire course of conduct," including "all facts and reasonable inferences concerning the defendant's activity related to the 'crime' for which [he] was convicted, not just those facts necessary to support the elements of the specific charge." ***Longmire***, 272 Wis. 2d 759, ¶13 (quoted source omitted).

¶19 Nelson asserts, and the State concedes, that the only crime considered at sentencing was disorderly conduct. It is undisputed that, if the State had charged Nelson with only a single count of disorderly conduct and the jury had convicted him of that count, the circuit court could have properly awarded

[3] In his brief-in-chief, Nelson argues the circuit court erroneously exercised its discretion by ordering him to pay Cynthia's medical expenses. In response, the State asserts that, rather than challenging the court's exercise of discretion, Nelson is actually challenging the court's "authority to order restitution to [Cynthia] for her medical bills[.]" In his reply brief, Nelson asserts he is challenging both the circuit court's authority to order restitution and its exercise of discretion in doing so.

However, aside from arguing that the court erroneously exercised its discretion by awarding restitution because there was no causal connection between Cynthia's medical expenses and the disorderly conduct conviction and because the expenses were not necessary, Nelson does not develop any separate argument that the court lacked authority to include the medical expenses in the restitution award. We therefore confine our analysis to whether the court erroneously exercised its discretion. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (we will not abandon our neutrality to develop arguments for the parties).

Cynthia's medical expenses as restitution based on the evidence adduced at trial. To obtain a conviction for disorderly conduct, the State must prove two elements beyond a reasonable doubt: (1) that the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct; and (2) that the defendant's conduct, under the circumstances, tended to cause or provoke a disturbance. *See* WIS JI—CRIMINAL 1900 (2012); *see also* WIS. STAT. § 947.01(1). Based on Cynthia's testimony that Nelson punched her and pushed her to the ground, the jury could have easily concluded he engaged in violent or abusive behavior tending to cause or provoke a disturbance.[4] Under these circumstances, the circuit court could have reasonably concluded the actions underlying Nelson's disorderly conduct conviction were a substantial factor in causing Cynthia's medical expenses. *See* ***Canady***, 234 Wis. 2d 261, ¶9.

¶20 Accordingly, the dispositive issue is whether the circuit court could still reasonably conclude Cynthia's medical expenses were caused by Nelson's disorderly conduct under circumstances where Nelson was also charged with, and acquitted of, two counts of battery. Nelson argues the court could not find a causal connection under these circumstances, because "the only logical interpretation of the jury's verdict is that the jury [found him] guilty of a crime but that crime was not punching [or pushing] Cynthia[.]" In other words, Nelson argues the disorderly conduct conviction must have been based on conduct other than the alleged punching or pushing—for instance, yelling at Cynthia or threatening her with a knife. Nelson further asserts there was "no testimony or

[4] Nelson concedes as much in his principal brief, stating, "[P]unching [Cynthia] in the face certainly would be disorderly conduct[.]" In addition, the State specifically said during its closing argument that the jury could convict Nelson of disorderly conduct based on the alleged punching or pushing.

other evidence [indicating] that the alleged injuries and ensuing hospital visit were caused by something other than" the alleged punching or pushing. Accordingly, he contends the conduct underlying his disorderly conduct conviction was not a substantial factor in causing Cynthia's medical expenses.

¶21 We disagree. Nelson's argument is premised on the notion that, because the jury acquitted him of the battery charges, it must have concluded he did not punch or push Cynthia. However, that does not necessarily follow. The crime of battery has four elements: (1) the defendant caused bodily harm to the victim; (2) the defendant intended to cause bodily harm to the victim or another person; (3) the defendant caused bodily harm without the victim's consent; and (4) the defendant knew that the victim did not consent. *See* WIS JI—CRIMINAL 1220 (2001); *see also* WIS. STAT. § 940.19(1). Here, the jury could have concluded, based on the evidence before it, that Nelson hit or pushed Cynthia during the course of their argument on December 28, 2012, but the physical contact was either unintentional or not intended to harm her. If the jury so concluded, it could have acquitted Nelson of the battery charges due to the lack of intent to cause bodily harm, but nevertheless convicted him of disorderly conduct based on a finding that, by hitting or pushing Cynthia, he committed violent or abusive conduct that tended to cause or provoke a disturbance. On this version of the facts, a causal connection would still exist between Nelson's disorderly conduct and Cynthia's medical expenses, despite his acquittal on the battery charges.

¶22 Alternatively, even if the jury accepted Nelson's testimony that he did not punch or push Cynthia, it could nonetheless have concluded he committed disorderly conduct while yelling at her during the course of a heated argument in which the two were repeatedly in close proximity to each other. The jury could

also have found that, during the course of the argument, Nelson continued moving away from Cynthia after she grabbed him, causing her to fall down.[5] In that case, any injuries Cynthia sustained in the fall would have been a natural consequence of Nelson's conduct—that is, engaging in a heated argument while the two were in close proximity to each other—even though he may not have intended to injure her. *See* ***Canady***, 234 Wis. 2d 261, ¶9. In other words, under these circumstances, Nelson's conduct would have set into motion events that resulted in Cynthia's injuries. *See* ***Longmire***, 272 Wis. 2d 759, ¶13 (causal link for restitution purposes exists when the defendant's criminal act set into motion events that resulted in the damage or injury). Furthermore, we again observe that, when determining whether a causal connection exists, a court may consider the defendant's entire course of conduct, not just those facts necessary to support the elements of the specific charge. ***Id.*** Thus, even if the jury determined Nelson did not hit or push Cynthia, it could still have concluded he committed disorderly conduct in such a way that Cynthia sustained injuries requiring medical treatment as a result.

¶23 As Nelson himself concedes, it is impossible to know which version of the facts the jury accepted in order to find him not guilty of the battery counts but guilty of disorderly conduct. However, as outlined above, there are at least two versions of the facts on which the jury could have acquitted him of the battery counts but nevertheless found he committed disorderly conduct in a manner that resulted in injuries to Cynthia. Accordingly, keeping in mind that the restitution

[5] In his reply brief, Nelson asserts Cynthia was injured, if at all, when she "slipped on the ice while lunging" for him. However, at trial, Nelson testified Cynthia grabbed him while he was going back into the apartment, he continued backing away from her, and she fell when she released her hold on him. He never testified that the balcony was icy or that Cynthia slipped on the ice.

statute must be applied liberally to compensate victims, *see* ***Madlock***, 230 Wis. 2d at 332, we conclude the circuit court properly exercised its discretion by finding that a causal connection existed between Cynthia's medical expenses and Nelson's disorderly conduct conviction.

¶24 Nelson next argues the circuit court erroneously exercised its discretion by including Cynthia's medical expenses in the restitution award because Cynthia failed to prove the expenses were necessary. *See* WIS. STAT. § 973.20(3)(a) (a court may order "necessary" medical expenses as restitution if a crime considered at sentencing resulted in bodily injury). In support of her restitution request, Cynthia submitted copies of two bills to the court: (1) a $2527.38 bill for her visit to the emergency room; and (2) a $1061 bill for CAT scans of her head and neck. Nelson argues these bills were insufficient to prove that Cynthia's medical care was necessary because "[a]nyone can walk into an emergency room and claim to have been battered. Regardless of whether the statement is true or not, physicians will order tests and bill the person[.]" Nelson therefore asserts Cynthia was required to present either medical records or physician testimony in order to prove the medical treatment she received was necessary.

¶25 Again, we disagree. The evidence presented at trial, along with the medical bills Cynthia submitted, was sufficient for the circuit court to conclude Cynthia's medical expenses were necessary. Under Cynthia's version of the facts, Nelson punched her and pushed her to the ground during an argument in their apartment. Under Nelson's version of the facts, Cynthia fell during the argument after she grabbed him and he continued moving away from her. Both Cynthia's daughter and deputy Snover testified Cynthia's face was swollen soon after the argument and there was blood near the side of her mouth. On these facts, it was

reasonable for Cynthia to go to the emergency room for evaluation. In addition, the provider who treated Cynthia in the emergency room clearly determined the CAT scans were necessary to diagnose her injuries, or the scans would not have been ordered.

¶26 Nelson cites two cases for the proposition that Cynthia was required to present medical records or physician testimony in order to meet her burden of proof. *See* ***Pucci v. Rausch***, 51 Wis. 2d 513, 517, 187 N.W.2d 138 (1971); ***Smee v. Checker Cab Co.***, 1 Wis. 2d 202, 206, 83 N.W.2d 492 (1957). These cases are inapt. Moreover, in ***Smee***, the court concluded there was insufficient proof the plaintiff's medical expenses were caused by a car accident because the bill submitted by the plaintiff did not distinguish between charges incurred as a result of the accident and charges related to a preexisting condition. ***Smee***, 1 Wis. 2d at 206. In ***Pucci***, there was a genuine question as to whether the plaintiff's injuries had been caused by the accident. ***Pucci***, 51 Wis. 2d at 517-18. Here, there is no evidence that Cynthia's medical expenses were the result of a preexisting condition or were caused by anything other than the altercation with Nelson. The evidence presented was therefore sufficient to establish, by a preponderance of the evidence, that Cynthia's medical expenses were necessary.

By the Court.—Judgment and order affirmed.

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