

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 17, 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. 2015AP1232-CR

Cir. Ct. No. 2012CF69

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN M. SCHUETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN and DAVID WAMBACH, Judges. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Shawn Schuett appeals from the restitution component of a criminal judgment and an order denying him postconviction relief. He raises two issues. First, he challenges whether the person and insurer seeking

restitution (collectively, B.S.) qualified as “victims” of his crimes of conviction within the meaning of WIS. STAT. § 973.20 (2013-14).¹ Second, he contends that the circuit court erroneously exercised its discretion by entering a restitution order without first holding a hearing. For the reasons discussed below, we conclude that B.S. met the statutory definition of a crime victim entitled to restitution, but that Schuett was entitled to a hearing to challenge the amount of restitution. Accordingly, we affirm the circuit court’s ruling regarding B.S.’s eligibility for restitution, but reverse the postconviction order and the portion of the judgment imposing restitution, and remand for a restitution hearing.

BACKGROUND

¶2 Schuett entered guilty pleas to three counts of first-degree recklessly endangering safety based upon an incident in which he fired six bullets at a fleeing car containing three people, with at least one of whom he was having a dispute over the payment of a debt. Three of the bullets Schuett fired hit the car he was aiming at, and each of the reckless endangerment counts made reference to one of the people in that car.

¶3 At sentencing, the State informed the court that, in addition to the three bullets that hit the targeted car, another one of Schuett’s bullets hit an unoccupied car in the vicinity, owned by a fourth victim, B.S., who had not been named in the complaint or mentioned at the preliminary hearing. The State produced a photograph of the damaged vehicle and, at the court’s request, the

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted. We use the current version of the statutes for ease of reference. Schuett does not contend that there have been any relevant changes in the statutes since the time his crime was committed.

Department of Corrections calculated a restitution request in the amount of \$500 to B.S. and \$747.81 to her insurer. The circuit court signed the restitution request and issued an amended judgment incorporating the requested amount of restitution.

¶4 Schuett moved to vacate the restitution order and the amended judgment on the grounds that B.S. was not a direct victim of his crimes, and that the restitution statute did not authorize the DOC to determine the amount of restitution. The circuit court denied the postconviction motion, and Schuett appeals.

STANDARD OF REVIEW

¶5 A circuit court has discretion to determine the amount of restitution owed in a criminal case. *State v. Kayon*, 2002 WI App 178, ¶6, 256 Wis. 2d 577, 649 N.W.2d 334. However, whether the restitution statute authorizes the circuit court to award restitution in the first instance, given a particular set of facts, is a question of law that we review de novo. *Id.*, ¶5. We interpret the restitution statute broadly, in order to effectuate the strong public policy that victims should not have to bear the burden of their losses when the defendant is capable of doing so. *State v. Canady*, 2000 WI App 87, ¶8, 234 Wis. 2d 261, 610 N.W.2d 147.

DISCUSSION

¶6 When imposing sentence or ordering probation, a court shall order the defendant to make full or partial restitution “to any victim of a crime considered at sentencing [including read-in offenses as well as counts of conviction] ... unless the court finds substantial reason not to do so and states the reason on the record.” WIS. STAT. § 973.20(1g)(a) and (1r). A crime considered

at sentencing encompasses “all facts and reasonable inferences concerning the defendant’s activity related to the crime for which the defendant was convicted, not just those facts necessary to support the elements of the specific charge.” *Canady*, 234 Wis. 2d 261, ¶10 (quoted source and emphasis omitted).

¶7 There is a two-part test to determine whether restitution can be ordered for a particular claimant in relation to a crime considered at sentencing. First, the claimant must be a “direct victim” of the crime; and second, there must be a causal connection between the defendant’s conduct and the harm suffered by the claimant. *State v. Hoseman*, 2011 WI App 88, ¶16, 334 Wis. 2d 415, 799 N.W.2d 497.

¶8 Schuett argues that B.S. was a collateral, rather than a direct, victim of his crimes because he did not intentionally target her vehicle when he was shooting at another car. We disagree. The crimes under consideration at sentencing were three counts of recklessly endangering safety, which do not require intent to cause harm to a specific person, but rather involve conduct that created a substantial and unreasonable risk of great bodily harm or death to a person under circumstances that showed utter disregard for human life. The course of conduct underlying Schuett’s crimes was shooting bullets at a moving vehicle in a parking lot, without regard for the lives of any innocent bystanders as well as the people in the car he was targeting.

¶9 Thus, regardless of Schuett’s intention, his conduct could be said to be directed at anyone in or around his line of fire. Certainly, if Schuett had struck another person, the fact that he was aiming at someone else would have provided no defense to a reckless endangerment charge. The fact that B.S. was not in her vehicle when Schuett’s stray bullet struck it was merely a matter of luck, and does

not alter her status as a “direct victim” who suffered economic harm directly from the conduct forming the basis for Schuett’s crimes of conviction. *See also* WIS. STAT. § 973.20(2)(b) (explicitly providing that if a crime considered at sentencing resulted in damage to or loss or destruction of property, the restitution order may require the defendant to pay the owner or the owner’s designee the reasonable repair or replacement cost).

¶10 As to the second part of the test, a causal link for restitution purposes is established when the defendant’s criminal activity “was a substantial factor in causing pecuniary injury to the victim” or “set into motion events that resulted in the damage or injury.” *State v. Longmire*, 2004 WI App 90, ¶13, 272 Wis. 2d 759, 681 N.W.2d 534 (quoted sources omitted). Assuming that B.S.’s vehicle was damaged by one of Schuett’s bullets, the causal connection test would plainly be satisfied.

¶11 Schuett complains that he was not provided a proper opportunity to challenge any evidence that Schuett actually caused the damage to B.S.’s vehicle, much less evidence about the amount of the claimed damages. The State argues that Schuett forfeited any right to raise an issue with respect to causality—or, for that matter, the victim’s status—by not objecting to a restitution order at the sentencing hearing, but the State essentially concedes that the circuit court erroneously exercised its discretion by failing to hold an evidentiary hearing on the amount of damages.

¶12 We are not persuaded that it is appropriate to apply forfeiture to Schuett’s failure to object to the imposition of restitution at the sentencing hearing, when the requested amount of restitution had not yet been established. We conclude, however, that Schuett may appropriately be limited to the arguments

that he raised in his postconviction motion—namely, that B.S. was not a victim of Schuett’s crimes and that the court used the wrong procedure to determine the amount of the award. We therefore deem any challenge to the causality of the damage to B.S.’s vehicle to have been forfeited. Accordingly, in conjunction with our discussion above explaining why B.S. was a direct victim of the crime, we affirm the circuit court’s ruling that B.S. qualified as a victim entitled to restitution under the statute.

¶13 However, we do agree with Schuett that the circuit court failed to follow one of the four procedures set forth in WIS. STAT. § 973.20(13)(c) for determining the amount of restitution. We therefore reverse the portion of the judgment of conviction and the postconviction order dealing with the amount of restitution, and remand with directions that the circuit court either hold a restitution hearing or follow one of the other statutory mechanisms for determining the amount of restitution. *See generally State v. Krohn*, 2002 WI App 96, ¶13, 252 Wis. 2d 757, 643 N.W.2d 874.

By the Court.—Judgment and 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)5.

