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**DISTRICT II**

May 1, 2019

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You are hereby notified that the Court has entered the following opinion and order:

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2018AP1474-CR

State of Wisconsin v. Alberto S. Galvan (L.C. #2013CF1711)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Alberto S. Galvan appeals from judgments of conviction for first-degree reckless injury, possession of marijuana, attempted operation of a vehicle without the owner's consent, and

felony bail jumping and from an order denying his motion for postconviction relief.<sup>1</sup> Galvan argues that the victim did not adequately prove that she was entitled to restitution for future lost wages based on injuries sustained from the head-on vehicle collision caused by Galvan. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>2</sup> We affirm.

In 2013, two police officers saw and smelled marijuana smoke emanating from a van at a McDonald's drive through. The officers performed a traffic stop on the van. While one of the officers was speaking to the passenger, Galvan, the driver of the van, sped off. A high speed chase ensued, ending when Galvan crashed head-on into another vehicle, driven by the victim. The victim had to be cut out of the vehicle and flown to a hospital due to the serious injuries sustained.

Galvan was charged, pled no contest to first-degree reckless injury and guilty to the remaining charges, and sentenced. The victim sought restitution in the amount of \$796,423.33: \$663,591.11 for incurred medical expenses, \$2175 for her vehicle, and \$130,657.22 for future lost wages. At the restitution hearing, the victim testified to the extent of her injuries resulting from the collision caused by Galvan, which included a severed spleen and liver, eight broken ribs, two broken arms, two broken legs, and internal bleeding. She endured fifteen surgeries within five days to remove her gallbladder, reconstruct her small intestine, and complete a skin graft to partially repair her right foot. The victim currently experiences depression, thoughts of

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<sup>1</sup> Galvan does not challenge the basis of his convictions on appeal.

<sup>2</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

suicide, anxiety, forgetfulness due to prescribed medications, severe stomach pains, difficulty using her right hand, and extreme pain while walking as if she is “walking on rocks.” She will need to undergo more surgeries on her foot as well as a total knee replacement. As a result of the accident, the victim was told by her physician that she is unemployable, will “never be able to work again,” and that she “would be on long-term disability.”

The trial court granted the full amount requested, finding the victim credible and fully disabled. The court further held that the projected future lost wages calculation was reasonable, if not conservative, given the victim appeared to be in good health, employed, and employable at the time of the collision. To calculate the amount of future lost wages, the court utilized the victim’s current wage and weekly hours of employment, despite testimony that the victim previously earned a higher wage and likely would again had the accident not occurred.

Galvan filed a motion for postconviction relief. In part, he requested that the amount for medical expenses be reduced by \$213,126.56, reflecting the amount paid by Medicare, and the amount for future lost wages be reduced by \$111,242.23. Galvan alleged the victim did not meet her burden to prove future lost wages. The court granted Galvan’s motion to reduce the restitution for incurred medical expenses paid by Medicare, but it denied his request to reduce the amount of restitution for the victim’s loss of future wages. Galvan appeals.

We review a dispute concerning the calculation of criminal restitution for an erroneous exercise of discretion. *State v. Canady*, 2000 WI App 87, ¶6, 234 Wis. 2d 261, 610 N.W.2d 147. “We may reverse a discretionary decision only if the circuit court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts.” *Id.* Restitution in a criminal case is governed by WIS. STAT. § 973.20, which provides that the court “shall order”

restitution for “a crime considered at sentencing ... unless the court finds substantial reason not to do so and states the reason on the record.” Sec. 973.20(1r). Section 973.20(5)(a) provides that the court may order the defendant to “[p]ay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing.” Loss of future earning capacity is properly considered special damages in personal injury actions. *See Musa v. Jefferson Cty. Bank*, 2001 WI 2, ¶30, 240 Wis. 2d 327, 620 N.W.2d 797 (“Among the items often classified as special damages are: the cost of medical care, the amount of lost wages or impairment of earning capacity.” (citation omitted)). The primary purpose of restitution is to compensate the victim, which “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. Longmire*, 2004 WI App 90, ¶11, 272 Wis. 2d 759, 681 N.W.2d 534 (citation omitted). The victim must prove the amount of loss sustained by a preponderance of the evidence. Sec. 973.20(14)(a). Applying these standards, we conclude the circuit court properly exercised its discretion.

Galvan does not dispute that he is responsible for the victim’s lost income from the time of the crime until the restitution hearing, which he agrees is established through the victim’s testimony, but he argues that the victim failed to satisfy her burden to prove she was entitled to any restitution for *future* lost income. Galvan claims that the “evidence simply did not permit the circuit court to estimate with any degree of reasonable certainty how long [the victim] would be unable to work, much less conclude that she will never be able to work again.” Galvan challenges the victim’s evidence, arguing that the statement in her restitution request that her

doctor told her that she would not be able to work again was “double hearsay” and “completely unreliable.”

First, “a restitution hearing is not the equivalent of a civil trial and does not require strict adherence to the rules of evidence.” *State v. Anderson*, 215 Wis. 2d 673, 677, 573 N.W.2d 872 (Ct. App. 1997). The circuit court, as the fact finder at a restitution hearing, “is free to accept and reject evidence and to give accepted evidence such weight as it desires.” *State v. Boffer*, 158 Wis. 2d 655, 663, 462 N.W.2d 906 (Ct. App. 1990).

Second, the victim presented detailed testimony of her injuries, her past and future surgeries, and her enduring physical struggles sufficient for the court to find—apart from her doctor’s statement—that she was “unemployable” and “fully disabled from work between her internal injuries, the stomach injuries, her foot and leg injuries, where she can’t walk and remain on her foot and do manual type of labor.” As to Galvan’s argument that the court could not establish future lost wages with any “degree of reasonable certainty,” our case law “recognize[s] that many elements that go to proof of loss of earning capacity cannot be established with certainty, and the fact finder must be allowed to consider ‘the reasonably apparent probabilities as they appear from the evidence, together with []known facts.’” *State v. Loutsch*, 2003 WI App 16, ¶15, 259 Wis. 2d 901, 656 N.W.2d 781 (citation omitted; second alteration in original), *overruled on other grounds by State v. Fernandez*, 2009 WI 29, 316 Wis. 2d 598, 764 N.W.2d 509; *see also* WIS JI—CIVIL 1762 (“You, therefore, are not required in determining the loss of future earning capacity to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.”).

For these reasons, we conclude that the circuit court applied the correct legal standard and grounded its decision on a logical interpretation of the facts in calculating the restitution amount to be paid for lost future wages. Accordingly, we affirm the trial court's determination.

Upon the foregoing reasons,

IT IS ORDERED that the judgments and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*