

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2015

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. 2015AP425-CR

Cir. Ct. No. 2013CF701

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK E. PILARSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

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

¶1 REILLY, P.J. Frank Pilarski appeals the amount of restitution he was ordered to pay for lost wages incurred by the mother of his four-year-old sexual assault victim. Pilarski argues the amount was improper as the mother's

reduction in work hours to care for her child was too attenuated from his crime to justify special damages. We affirm.

¶2 Pilarski was charged with first-degree sexual assault of K.A., a four-year-old girl left in his care at a private child care operation run out of his home. He subsequently pled no contest to a reduced charge of second-degree sexual assault of a child. The State sought restitution in the amount of \$25,018.13, which included \$18,688 for lost wages due to a reduction in work hours by K.A.'s mother.

¶3 A.A., K.A.'s mother, testified at the restitution hearing that she was employed as a surgical nurse. A.A.'s employment as a surgical nurse often required her to be at work before 6 a.m. and remain until after 6 p.m. She testified that after her daughter's assault she only considered sending her children to day care centers, which operate from 6 a.m. to 6 p.m. and do not fit either her husband's or her work schedule. At the time that charges were filed, she had been working five days per week, but after the charges were filed, she reduced her work schedule to three days per week to accommodate the change in child care for K.A. A.A. stated, "I will not use private child care, period."

¶4 In considering the State's restitution request, the court recognized that due to the nature of A.A.'s profession, her hours were somewhat unpredictable and did not conform to typical day care center hours. The court considered the decision by A.A. and her husband to rule out private care for their children, stating that it was hard to argue with their perception that private child care would be unsafe. The court further stated that "recognizing the circumstances unique to this case," it was appropriate to award special damages resulting from this child care decision. Therefore, the court approved the State's request for

restitution related to lost wages due to A.A.'s reduction in hours up to the time of sentencing, but stated that it would not permit restitution for wage loss going forward.

¶5 Pilarski challenges the circuit court's award of restitution for A.A.'s reduction in pay on the ground that A.A.'s decision to move from full-time to part-time employment was too attenuated from his crime to establish the requisite causal link.¹ Although a circuit court's assessment of restitution is within its discretion, whether a restitution order comports with the statute is subject to de novo review. *State v. Rash*, 2003 WI App 32, ¶5, 260 Wis. 2d 369, 659 N.W.2d 189. As the purpose of restitution is to return crime victims to the position they were in prior to injury by the defendant, we liberally construe the restitution statute to allow victims to recover their losses. *State v. Johnson*, 2005 WI App 201, ¶14, 287 Wis. 2d 381, 704 N.W.2d 625.

¶6 WISCONSIN STAT. § 973.20(1r) requires a circuit court to order full or partial restitution to any victim of the defendant's crime unless the court finds substantial reason not to do so and states the reason on the record. The restitution order may require 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 [the] crime considered at sentencing." Sec. 973.20(5)(a).

¹ Pilarski does not contest that A.A. is a victim of his crime for restitution purposes. *See* WIS. STAT. § 950.02(4)(a)2. (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶7 Restitution is limited by WIS. STAT. § 973.20(5)(a) in two ways. First, there must be a showing that the defendant's criminal activity was a substantial factor in causing pecuniary injury to the victim. *State v. Longmire*, 2004 WI App 90, ¶13, 272 Wis. 2d 759, 681 N.W.2d 534. A causal link is established when the defendant's criminal act sets in motion events that result in the damage or injury. *State v. Hoseman*, 2011 WI App 88, ¶26, 334 Wis. 2d 415, 799 N.W.2d 479. A defendant cannot escape responsibility for restitution just because his or her actions did not directly cause the damage. *Johnson*, 287 Wis. 2d 381, ¶13. "[T]he rule in Wisconsin is that if the defendant's actions were the precipitating cause of the injury complained of, and such injury was the natural consequence of the actions, the defendant is liable." *State v. Behnke*, 203 Wis. 2d 43, 59, 553 N.W.2d 265 (Ct. App. 1996).

¶8 Second, restitution is limited to "special damages." This restrains the court from ordering payment for "general damages" intended to compensate a victim for damages such as pain and suffering, anguish, or humiliation, which are often experienced by crime victims. *State v. Holmgren*, 229 Wis. 2d 358, 364-65, 599 N.W.2d 876 (Ct. App. 1999). Special damages "in the criminal restitution context encompass 'harm of a more material or pecuniary nature' and represent the victim's actual pecuniary losses." *Id.* at 365. "[T]he ultimate question in deciding whether an item of restitution is 'special damages' within the meaning of the statute is whether the item is a readily ascertainable pecuniary expenditure attributable to the defendant's criminal conduct that could be recovered in any type of civil action." *Johnson*, 287 Wis. 2d 381, ¶12.

¶9 Pilarski does not contest that A.A. was forced to find alternative child care due to his crime. Rather, he argues that A.A. had options other than the

one that she chose and that, therefore, the causal link between his crime and A.A.'s pecuniary loss due to wage reduction was too attenuated. We disagree.

¶10 Pilarski's criminal act of sexually assaulting K.A. while she was in his care at his private, in-home child care center set in motion A.A.'s search for alternative child care. *See Hoseman*, 334 Wis. 2d 415, ¶26. Pilarski's criminal actions precipitated A.A.'s reduction in hours to accommodate her need for new child care arrangements, which were a consequence of Pilarski's actions. *See Behnke*, 203 Wis. 2d at 59. A.A.'s reduction in pay was an ascertainable, actual pecuniary loss she suffered as a result of Pilarski's crime. *See Holmgren*, 229 Wis. 2d at 365. The court did not err in finding that Pilarski's criminal act was a substantial factor that caused A.A.'s wage losses due to the reduction in her work schedule, and it appropriately exercised its discretion in limiting the amount that A.A. could recover for lost wages to the amount requested at the time of the restitution hearing. *See Longmire*, 272 Wis. 2d 759, ¶16 (we review the amount of restitution awarded, as opposed to whether restitution is authorized by statute, for an erroneous exercise of discretion).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

