

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 21, 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. 2015AP1855-CR

Cir. Ct. No. 2013CF72

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ZACHERY J. PAGENKOPF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
THOMAS B. EAGON, Judge. *Affirmed.*

¶1 BLANCHARD, J.¹ Zachery Pagenkopf appeals the circuit court's restitution order entered following his convictions for misdemeanor battery,

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

disorderly conduct, and resisting a police officer. More specifically, Pagenkopf challenges the court's denial of his motion requesting de novo review by the court of a restitution hearing conducted by a circuit court commissioner, and also challenges the amount of restitution ordered by the court.

¶2 I conclude that Pagenkopf was not entitled to de novo review by the court because the commissioner acted under a referral from the court under WIS. STAT. § 973.20(13)(c)4., pursuant to which the commissioner had authority only to prepare "proposed findings of fact and conclusions of law" for consideration by the court, and the commissioner lacked authority to make a "decision," as that term is used in WIS. STAT. § 757.69(8). The court, and not the commissioner, made the restitution decision set forth in the court's order. I also conclude that the court rationally interpreted the pertinent facts and applied the correct legal standards, and therefore the court did not erroneously exercise its discretion in ordering restitution in the amount that it did. Accordingly, I affirm.

BACKGROUND

¶3 Pagenkopf entered pleas to charges based on a single-victim offense and received a sentence that included a term of probation. The court ordered restitution as a condition of probation. The district attorney's office submitted to the court a restitution summary, which was a request for an order requiring Pagenkopf to make restitution payments to various parties, based on documentation that the victim had provided to the district attorney detailing payments that the victim and his insurers were allegedly obligated to make as a result of his injury. Pagenkopf contested the amount. Pursuant to WIS. STAT.

§ 973.20(13)(c)4., the court referred restitution issues to a commissioner to conduct a hearing and make proposed findings.²

¶4 At the restitution hearing before the commissioner, the victim testified regarding the injuries he sustained in the assault by Pagenkopf. Specifically, the victim testified that he suffered a torn quadriceps tendon in his left knee, resulting in lost work hours and medical expenses. Pagenkopf presented evidence that the victim had initially told his physician that he injured his knee by slipping on ice. However, the State offered into evidence a note by the treating physician, in which the physician opined that an assault had in fact caused the knee injury.

¶5 The restitution summary submitted by the district attorney's office requested restitution for a total of \$15,656.95, broken down as follows: the victim for his out-of-pocket medical expenses of \$4,332.04; ACS Insurance based on its payment of \$9,594.75 for additional medical bills; and Reliance Standard Insurance based on its payment of \$1,730.16 for disability payments. The State also requested restitution for the state Crime Victim Compensation Program for its

² WISCONSIN STAT. § 973.20(13)(c)4. provides in pertinent part that, in the event that a defendant does not stipulate "to the restitution claimed by the victim[,] or if any restitution dispute" cannot "be fairly heard at the sentencing proceeding," a circuit court "may":

4. Refer the disputed restitution issues to a circuit court commissioner or other appropriate referee, who shall conduct a hearing on the matter and submit the record thereof, together with proposed findings of fact and conclusions of law, to the court within 60 days of the date of referral. Within 30 days after the referee's report is filed, the court shall determine the amount of restitution on the basis of the record submitted by the referee and incorporate it into the sentence or probation order imposed.

payment of \$3,617.74 toward additional medical bills, bringing the total to \$19,274.69.

¶6 Following the restitution hearing, and within 60 days of the referral, the commissioner submitted the record, along with the commissioner's proposed findings of fact and conclusions of law, to the court, as required by WIS. STAT. § 973.20(13)(c)4. The commissioner's proposed finding that Pagenkopf's actions caused the victim's knee injury, and that as a result Pagenkopf owed the victim, the insurance companies, and the state Crime Victim Compensation Program the amounts requested by the State.

¶7 Based on the transmitted record, the court reviewed the commissioner's proposed findings of fact and conclusions of law, and determined the restitution amount to be \$19,274.69, as reflected in the judgment of conviction.

¶8 Pagenkopf requested that the court conduct a de novo review of the restitution hearing and the commissioner's proposed findings of fact. Pagenkopf cited WIS. STAT. § 757.69(8) as authority for this request.³ The court denied the request, concluding that the court itself, and not the commissioner, had made the decisions resulting in the restitution order, that de novo review of the commissioner's referral package was not available under WIS. STAT.

³ WISCONSIN STAT. § 757.69(8) provides:

Any decision of a circuit court commissioner shall be reviewed by the judge of the branch of court to which the case has been assigned, upon motion of any party. Any determination, order, or ruling by a circuit court commissioner may be certified to the branch of court to which the case has been assigned, upon a motion of any party for a hearing de novo.

§ 973.20(13)(c)4., and that de novo review was not required under § 757.69(8). Pagenkopf filed a motion to reconsider, which the court denied.

DISCUSSION

¶9 Pagenkopf contends that WIS. STAT. § 757.69(8) entitles him to de novo review by the court of the commissioner’s proposed findings of fact and conclusions of law, because the commissioner made a “decision” through the hearing and fact finding process, and de novo review by the court would not be inconsistent with the terms of WIS. STAT. § 973.20(13)(c)(4).

¶10 To repeat, WIS. STAT. § 757.69(8), which is in a statute entitled “Powers and duties of circuit court commissioners,” states:

Any decision of a circuit court commissioner shall be reviewed by the judge of the branch of court to which the case has been assigned, upon motion of any party. Any determination, order, or ruling by a circuit court commissioner may be certified to the branch of court to which the case has been assigned, upon a motion of any party for a hearing de novo.

Section 757.69(8) (emphasis added).

¶11 Separately, Pagenkopf argues that the court erroneously exercised its discretion in awarding restitution, contending that: (1) there was insufficient evidence to link his criminal conduct to the victim’s injury, or to establish actual medical costs for the restitution award; (2) the court failed to consider Pagenkopf’s indigency; and (3) justice did not require that the insurance companies receive restitution, or perhaps to receive restitution in the amounts set by the court.

I. De Novo Review

¶12 Whether the court should grant the motion for de novo review is an issue of statutory interpretation. The interpretation and application of a statute presents a question of law, which I review based on a de novo review of the record on appeal. *State v. Johnson*, 2005 WI App 201, ¶10, 287 Wis. 2d 381, 704 N.W.2d 625.

¶13 The objective in interpreting a statute is to discern the intent of the legislature. *State v. Hufford*, 186 Wis. 2d 461, 464, 522 N.W.2d 26 (Ct. App. 1994). If a statute is unambiguous on its face, this court looks no further than the language of the statute itself for interpretation, discerning the intent of the legislature from the words selected by the legislature. *Id.* In addition, when multiple statutes address a topic, “we seek to construe them so that they are harmonious.” *State ex rel. Rupinski v. Smith*, 2007 WI App 4 ¶19, 297 Wis. 2d 749, 728 N.W.2d 1 (quoted source omitted).

¶14 While Pagenkopf challenges the restitution order, he acknowledges that the court and the commissioner operated within the authority granted each of them under WIS. STAT. § 973.20(13)(c)4. in addressing the restitution issue. His argument is that de novo review by the court is required upon request because the commissioner made a “decision,” more specifically a “determination,” under WIS. STAT. § 757.69(8), when the commissioner held a hearing and proposed findings, which were the basis for, and were adopted in, the court’s restitution order. I disagree.

¶15 The terms of WIS. STAT. § 973.20(13)(c)4. direct the commissioner or referee to submit only the following items to the court following the referral: the record of the hearing and “*proposed* findings of fact and conclusions of law.”

Section 973.20(13)(c)4. (emphasis added). At that point, it is up to the court to “*determine* the amount of restitution.” *Id.* (emphasis added). The commissioner or referee is explicitly relegated to the role of creating a proposed restitution figure, and then forwarding it, along with the supporting material, to the court. The court then uses all of this material to make the determination that will bind the defendant. *See id.* Thus, in reaching its restitution decision, the court will have before it, in the form of the record, any evidence or argument presented by the defendant that might undermine any proposed restitution amount.

¶16 The commissioner here submitted to the court a report, which included the record of the hearing, together with proposed findings of fact and conclusions of law. The commissioner did not purport to make any decision, determination, order, or ruling. Everything that the commissioner did was in support of allowing the court to “determine the amount of restitution on the basis of the record submitted by” the commissioner. *See id.*

¶17 It is of no consequence that the court decided not to adjust the commissioner’s proposed findings, based on the record created before the commissioner. The court plainly understood that it was the decision maker, and exercised the decisionmaking authority granted under WIS. STAT. § 973.20(13)(c)4. The court was of course not obligated to demonstrate its independent decisionmaking authority by altering the proposed findings. Pagenkopf asserts that “the commissioner’s proposed order become *the* order” (emphasis in original), but this is wrong. The court issued its own order, based on all materials submitted by the commissioner.

¶18 Pagenkopf argues that WIS. STAT. § 757.69(8) operates as a “blanket de novo provision,” and therefore a circuit court cannot dismiss a motion for de

novo review without citing directly contrary legal authority. In support of this argument, Pagenkopf relies heavily on *State v. Gillespie*, 2005 WI App 35, 278 Wis. 2d 630, 693 N.W.2d 320. In *Gillespie*, this court concluded that the defendant's right to de novo review of a preliminary hearing in a criminal case was precluded only because a more specific statute preempted the blanket de novo provision in that case. *Id.*, ¶11. In addition, as persuasive authority, Pagenkopf directs us to a one-judge, unpublished opinion. See *Dane County v. T.B.*, No. 2015AP799, unpublished slip op. (WI App October 1, 2015) (if no statute specifically limits the availability of a second probable cause hearing, a request for de novo review is not precluded). However, these cases are readily distinguishable from the current case because the commissioners in *Gillespie* and *T.B.* were not acting under the authority of WIS. STAT. § 973.20(13)(c)4.

¶19 In *Gillespie*, the commissioner was acting under the authority of WIS. STAT. § 757.69(1)(b), which gives a commissioner authority to “conduct the preliminary examination and arraignment.” *Gillespie*, 278 Wis. 2d 630, ¶1. In *T.B.*, the commissioner was acting under the authority of WIS. STAT. § 51.20(1)(c), which gives the commissioner authority to carry out “duties to be performed by the court.” No. 2015AP799, unpublished slip op. ¶3 (WI App October 1, 2015). In this case, the commissioner and the court acted under authority of WIS. STAT. § 973.20(13)(c)4., under which the commissioner lacked authority to make a decision subject to de novo review, and therefore § 757.69(8) does not apply.

¶20 Pagenkopf argues that he had a right to have the restitution issue heard and decided by an elected judge rather than by a commissioner, because a commissioner is “not subject to the same scrutiny as elected judges and may labor under conditions that are less conducive to a just result.” While there are of course

differences between the two offices, this argument amounts to a policy preference rejected by the legislature. As explained above, WIS. STAT. § 973.20(13)(c)4. explicitly permits a circuit court to “[r]efer the disputed restitution issues to a circuit court commissioner or other appropriate referee.” Section 973.20(13)(c)4. Moreover, as explained above, an elected judge did in fact decide the restitution issues here.

¶21 Further, as the State points out and Pagenkopf concedes, requiring de novo review in this context would mean that a commissioner’s findings following a restitution hearing would be subject to de novo review, while those of a non-commissioner referee would not. *See id.* Allowing de novo review of a commissioner’s findings but not of a referee’s would appear to be an absurd result, and this court seeks to avoid absurd results when interpreting statutory language. *See State v. Koeppe*n, 2014 WI App 94, ¶8, 356 Wis. 2d 812, 854 N.W.2d 849.

¶22 For all these reasons, I conclude that Pagenkopf is not entitled to de novo review.

II. Discretionary Restitution Decision

¶23 A circuit court has discretion in determining whether the defendant’s criminal activity was a substantial factor in causing any expenses for claimed restitution and, if so, in deciding the amount of restitution. *Johnson*, 287 Wis. 2d 381, ¶10. This court will not reverse a circuit court’s discretionary decision unless the circuit court erroneously exercised its discretion. *Barricade Flasher Service, Inc. v. Wind Lake Auto Parts, Inc.*, 2011 WI App 162, ¶5, 338 Wis. 2d 144, 807 N.W.2d 697. A circuit court properly exercises its discretion if the court examines the relevant facts, applies a proper standard of law, and uses a demonstrated

rational process to reach a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982).

¶24 Pagenkopf asserts that the circuit court erroneously exercised its discretion in concluding that his criminal conduct was a “substantial factor” in causing the victim’s injuries. For a circuit court to order restitution there must be a showing that the defendant’s criminal activity was a “substantial factor” in causing pecuniary injury to the victim. *Johnson*, 287 Wis. 2d 381, ¶13 (quoted source omitted). “Substantial factor” means the defendant’s conduct played a part in producing the harm such that a reasonable trier of fact would regard it as a cause of the harm. *Id.*

¶25 Based on my review of the record, I conclude that the court applied the proper legal standard and reached a conclusion that a reasonable judge could have reached. The court recognized that a major issue was whether Pagenkopf’s actions caused the victim’s injury. The court concluded that testimony by the victim and the opinion of the victim’s treating physician, summarized above, supported a finding that Pagenkopf’s actions caused the victim’s injury. A reasonable person could rationally interpret this evidence to mean that Pagenkopf’s actions were a “substantial factor” in causing the harm.

¶26 Pagenkopf emphasizes aspects of the record that could have led the court to discount or question the victim’s account about the nature of the assault and his injuries. However, it was for the court to weigh the evidence on these topics in exercising its discretion. Pagenkopf dismisses the testimony of the victim as “self-interested,” but the court could exercise its discretion to rely on parts or all of the victim’s testimony.

¶27 Pagenkopf also asserts that the circuit court erroneously exercised its discretion in awarding restitution for alleged medical costs. “The restitution summary in itself is sufficient to meet the statutory requirement that the court ‘inquire of the district attorney regarding the amount of restitution, if any, that the victim claims.’” *State v. Szarkowitz*, 157 Wis. 2d 740, 748, 460 N.W.2d 819 (Ct. App. 1990) (quoting WIS. STAT. § 973.20(13)(c)). However, if there is an objection to the State’s restitution summary, the court must make a finding under WIS. STAT. § 973.20(13)(a)1. regarding “the amount of loss suffered by any victim as a result of a crime considered at sentencing.” *Id.*

¶28 Here, Pagenkopf contested the restitution summary before the commissioner, thereby triggering the need for the court to make a finding as to the amount of the losses suffered as a result of Pagenkopf’s actions. *See Szarkowitz*, 157 Wis. 2d at 748. Based on the victim’s testimony at the hearing before the commissioner, the court found that the restitution requests were reasonable.

¶29 Pagenkopf argues that the circuit court “double counted” damages by failing to deduct the portion going directly to the victim from the amount requested for ACS insurance in the district attorney’s restitution summary. Although there could have been double counting if the ACS payment of \$9,594.75 was the total amount of medical bills resulting from the victim’s injury, there is an evidentiary basis to conclude that the total amount was higher. According to testimony at the hearing, the victim paid a portion of the medical bills before the insurance picked up the balance due. This testimony supported the court’s grant of the claimed restitution for some portion of medical costs directly to the victim, and the court’s grant of claimed restitution for additional medical costs to ACS. This is a reasonable interpretation of the evidence.

¶30 Pagenkopf also raises a concern that there may have been double counting in restitution granted to the state Crime Victim Compensation Program and restitution granted to the victim. However, the State offered a letter into evidence that showed that the program made payments directly to health care providers. Pagenkopf fails to explain why this did not provide the court with a sufficient basis to award restitution to both the state Crime Victim Compensation Program and to the victim.

¶31 Pagenkopf asserts that the court also erroneously exercised its discretion when it failed to consider his alleged indigent status before ordering him to pay restitution, although Pagenkopf acknowledges that his argument runs contrary to established law, which he urges this court to “revisit.” As Pagenkopf acknowledges, under WIS. STAT. § 973.20(14)(b), the burden is on the defendant to demonstrate his “financial resources” and “present and future earning ability.” Section 973.20(14)(b). When a defendant fails to offer any evidence on the issue of his or her inability to pay amounts claimed as restitution, the defendant has failed to meet his or her burden of proof and no findings on this point are required. *Szarkowitz*, 157 Wis. 2d at 750. Pagenkopf failed to meet his burden by failing to offer any evidence of his indigency at the restitution hearing, and I lack authority to “revisit” settled law even if I were inclined to do so.

¶32 Pagenkopf’s final argument is unclear. He asserts that the court erroneously exercised its discretion in awarding “the bulk” of the restitution to insurance companies, but it is not clear what he intends to argue on this point that differs from arguments that I have rejected above. In any case, a circuit court has discretionary authority under the restitution statute to reimburse insurance companies that have provided funds that have the effect of compensating a victim. WIS. STAT. § 973.20(5)(d) (“If justice so requires, [the restitution order may

require the defendant] reimburse any insurer, surety, or other person who has compensated a victim for a loss otherwise compensable under this section.”); *State v. Fernandez*, 2009 WI 29, ¶62, 316 Wis. 2d 598, 764 N.W.2d 509 (it is within the circuit court’s discretion to determine whether justice requires reimbursement to insurance companies); *State v. Gibson*, 2012 WI App 103, ¶16, 344 Wis. 2d 220, 822 N.W.2d 500 (circuit court reasonably determined that insurer was entitled to compensation for losses incurred in fulfilling obligation to insured in manner consistent with its business practice). The court here appears to have reasonably found that the insurance companies were entitled to compensation for paying a portion of the victim’s medical bills and disability to which the victim is entitled—payments that were necessary because of injuries resulting from the assault—and I do not discern in Pagenkopf’s final argument a basis to conclude that the court erroneously exercised its discretion in doing so.

By the Court.—Judgment affirmed.

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

