

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 2017

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. 2016AP937-CR

Cir. Ct. No. 2015CF1123

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROY A. MITCHELL, JR.,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Dane County:
DAVID T. FLANAGAN III, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Roy A. Mitchell, Jr.,² appeals a criminal restitution order and an order denying reconsideration of that restitution order. Both orders were entered following Mitchell's convictions for misdemeanor theft, prostitution, and resisting or obstructing an officer. Mitchell argues that the circuit court erred by including in the restitution order \$11,059.43 to cover the alleged victim's medical expenses resulting from a physical altercation between Mitchell and the alleged victim. As explained below, Mitchell fails to persuade me that the circuit court erred based on the arguments that Mitchell made in that court. Other arguments Mitchell makes for the first time on appeal I reject as forfeited. I affirm the circuit court's orders.

Background

¶2 Mitchell was initially charged with misdemeanor theft, misdemeanor battery, strangulation/suffocation, and resisting or obstructing an officer. The criminal complaint included the following allegations. An officer responding to the scene observed Mitchell and the alleged victim, who the parties refer to as J.C., involved in a physical altercation. The officer detained J.C., who claimed that Mitchell had taken money from J.C.'s wallet and fled. J.C. began to chase Mitchell, and the altercation ensued. Police detained Mitchell, who initially provided a false name of "Kevin" and a false birth date.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2015-16 version.

² Mitchell's counsel, in briefing, refers to Mitchell by the first name Lisa and informs this court that Mitchell identifies as female. Counsel uses female pronouns for Mitchell. I follow counsel's lead and in this opinion use female pronouns for Mitchell.

¶3 During Mitchell's preliminary hearing, the responding officer testified consistently with these complaint allegations. Following the officer's testimony, Mitchell made a statement on the record claiming that, at the time of her alleged crimes, J.C. was trying to purchase sex from Mitchell. Mitchell characterized that day's events as "a prostitution gone bad."

¶4 At Mitchell's plea hearing several months later, the prosecutor explained that, after substantial follow-up investigation shed new light on the facts, the parties reached a plea deal. The State agreed to dismiss the misdemeanor battery and strangulation/suffocation charges and also to dismiss an added felony-theft-from-the-person-of-another charge. In exchange, Mitchell agreed to plead guilty to the misdemeanor theft and resisting or obstructing charges and also to plead guilty to an added charge for prostitution. The circuit court accepted Mitchell's guilty pleas to the agreed-upon charges, and proceeded to sentence Mitchell in accordance with a joint recommendation by the parties.

¶5 Later, the State sought restitution. The State's restitution request included, as pertinent here, two amounts: \$393, corresponding to a cash amount discovered in Mitchell's possession during a jail search, and \$11,059.43, corresponding to J.C.'s medical expenses resulting from the physical altercation between Mitchell and J.C.

¶6 Mitchell conceded that the \$393 amount was an appropriate item of restitution for Mitchell's theft crime, but objected to the inclusion of J.C.'s medical expenses. Mitchell did not dispute that an altercation had occurred or that the altercation resulted in J.C.'s claimed medical expenses. Rather, Mitchell argued that J.C.'s injuries and expenses bore no relationship to any of the crimes for which Mitchell had been convicted and sentenced. The circuit court disagreed,

and concluded that the medical expenses were sufficiently related to Mitchell's course of conduct.

Discussion

¶7 Mitchell challenges the circuit court's decision to include in the restitution order J.C.'s medical expenses resulting from the altercation. I reject that challenge for the reasons that follow.

¶8 At the outset, I acknowledge having difficulty discerning the gist of Mitchell's circuit court and appellate arguments. What follows is an effort to give Mitchell's arguments against the restitution order full and fair consideration, at least insofar as she preserved arguments by making them before the circuit court. Mitchell's arguments raised for the first time on appeal, however, are forfeited and will not be addressed. *See Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177. After providing a brief summary of pertinent restitution law, I discuss Mitchell's arguments in more detail below.

¶9 “Restitution is governed by WIS. STAT. § 973.20.” *State v. Hoseman*, 2011 WI App 88, ¶14, 334 Wis. 2d 415, 799 N.W.2d 479. Under that statute, the circuit court “shall order the defendant to make full or partial restitution ... to any victim of a crime considered at sentencing.” WIS. STAT. § 973.20(1r). “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).

¶10 There is no dispute here that the dismissed charges against Mitchell—felony theft from the person of another, misdemeanor battery, and strangulation/suffocation—were *not* read in. Thus, there is also no dispute that the

only crimes “considered at sentencing” were the crimes for which Mitchell was convicted—misdemeanor theft, prostitution, and resisting or obstructing an officer. Thus, restitution here must be based on these latter three crimes.

¶11 The circuit court’s authority to order restitution for crimes considered at sentencing is limited by two requirements. *See Hoseman*, 334 Wis. 2d 415, ¶16. “First, the claimant of restitution must be a ‘direct victim’ of the crime.” *Id.* “Second, there must be a causal connection between the defendant’s conduct and harm suffered by the claimant.” *Id.*

¶12 Mitchell challenges the application of both requirements here but, as we shall see, her main focus is on the causal connection requirement.

¶13 Briefly, as to the victim requirement, Mitchell argues that J.C. was not a victim of Mitchell’s prostitution crime or of Mitchell’s resisting or obstructing an officer crime. Regardless of the merit of that argument, J.C. plainly *was* a victim of Mitchell’s theft crime, a point that Mitchell all but concedes. Thus, under the restitution statute, J.C. was a victim of a crime considered at sentencing, namely, the theft crime. I therefore need not decide whether J.C. was a victim of Mitchell’s other crimes.

¶14 The remainder of my analysis focuses on why I reject Mitchell’s contention that the causal connection requirement is not met.

¶15 Courts have repeatedly used broad language in explaining how the causal connection requirement works. The defendant’s conduct need only be a “substantial factor” in causing damage. *See State v. Canady*, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147. That is, the defendant’s conduct need not be the sole cause or the most immediate or direct cause of the alleged damage. *See*

State v. Behnke, 203 Wis. 2d 43, 59, 553 N.W.2d 265 (Ct. App. 1996) (victim may receive restitution for cost of treatment without needing to prove that the defendant’s actions were the “sole factor” leading to the injury that required treatment); *Canady*, 234 Wis. 2d 261, ¶¶1-2, 9-12 (restitution for a damaged door was proper when the door was damaged by a police officer tossing a pry bar against the door in the process of disarming the defendant of the pry bar).

¶16 Further, in ordering restitution, courts do not focus narrowly on the elements of the defendant’s crime, but broadly on the defendant’s *underlying course of conduct*:

[A] trial court may take[] a defendant’s entire course of conduct into consideration 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.

State v. Longmire, 2004 WI App 90, ¶13, 272 Wis. 2d 759, 681 N.W.2d 534 (bracketed material in original; internal quotation marks and quoted source omitted).

¶17 Applying these standards here, it is abundantly clear that if, as alleged in the complaint, Mitchell’s course of conduct surrounding her admitted theft from J.C. included the physical altercation between Mitchell and J.C., then there is a causal connection between Mitchell’s conduct and the altercation along with the resulting injuries J.C. suffered and medical expenses J.C. incurred.

¶18 Mitchell’s main causal connection argument appears to erroneously focus not on Mitchell’s course of conduct relating to the theft but instead on the *elements* of the various charges against Mitchell. Mitchell asserts that “[p]hysical injury is not a natural consequence of misdemeanor theft” and that “all criminal

allegations regarding physical injury or contact were dismissed.” This elements-based argument is, as best I can tell, a renewal of Mitchell’s argument in the circuit court, in which Mitchell pointed out that all charges with elements involving physical injury or contact were dismissed and *not* read in.

¶19 I reject this argument because, to repeat, in deciding restitution issues, courts are to consider the “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.” See *Longmire*, 272 Wis. 2d 759, ¶13 (bracketed material in original; internal quotation marks and quoted source omitted). The fact that the dismissed charges against Mitchell were the only charges to include elements involving bodily injury or contact does not, by itself, matter. To illustrate, the causal connection inquiry in this case would be the same had Mitchell been charged *only* with the theft crime for which she was convicted.

¶20 Mitchell may mean—and may have meant in the circuit court—to make another argument based on the dismissed charges, namely, that those charges were dismissed and not read in because the State’s case as to those charges was weak or because the State deemed Mitchell not culpable as to those charges. Putting aside whether there is factual support in the record for this argument, I fail to see how the argument is helpful to Mitchell on the restitution issue. The pertinent question, again, is whether the altercation was part of the course of conduct that included Mitchell’s theft-related conduct. If what Mitchell means to argue is that restitution for J.C.’s medical expenses was unfair or should have been offset because of J.C.’s possible role in events or Mitchell’s own resulting injuries from J.C.’s conduct, Mitchell has not sufficiently developed that argument to warrant consideration. See *State v. Pettit*, 171 Wis. 2d 627, 646-47,

492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider inadequately developed arguments).

¶21 Turning to Mitchell’s reply brief, Mitchell appears to develop additional arguments that were, at best, hinted at in her principal brief. Mitchell argues, as I understand it, that the State failed to meet its burden of proving causation because the record lacks evidence to support a finding that her theft, as alleged in the complaint, bore any relationship to the altercation. Mitchell seems to say that, for all we know based on the sparse factual record and contrary to the complaint allegations, the theft might have occurred some time *after* the altercation.

¶22 These fact-based arguments are not arguments that Mitchell raised in the circuit court. The disputed issue, as already discussed, was whether restitution for J.C.’s medical expenses was precluded by the dismissal of all charges with elements involving bodily injury or contact. Accordingly, I reject Mitchell’s fact-based arguments as forfeited. *See Schill*, 327 Wis. 2d 572, ¶45 & n.21; *see also State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (court of appeals does not “blindsided trial courts with reversals based on theories which did not originate in their forum”).

Conclusion

¶23 For the reasons stated, I affirm the restitution order and the order denying reconsideration of the restitution order.

By the Court.—Orders affirmed.

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

