

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 16, 2007

David R. Schanker
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. 2006AP1985

Cir. Ct. No. 2005JV290

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE INTEREST OF MICHAEL L. W., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

MICHAEL L. W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County:
LINDA M. VAN DE WATER, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ Michael L.W. appeals from a postdispositional order in a juvenile case directing that he pay \$6000 in restitution to the victim.² Michael argues that the juvenile court failed to consider his ability to pay when issuing the restitution order. We disagree. We conclude that the juvenile court properly exercised its discretion in setting Michael's restitution obligation.

¶2 The relevant facts and procedural history of this case are not in dispute. On January 10, 2006, Michael admitted to a charge of party to the crime of criminal damage to property.³ The juvenile court conducted a dispositional hearing the same day, resulting in a dispositional order adjudicating Michael delinquent, placing him on formal supervision for one year, and scheduling a future hearing on the question of restitution. At the restitution hearing on January 23, 2006, Michael, his foster mother, and the victim testified. At the conclusion of the hearing, the court ordered Michael to pay restitution in the amount of \$9161.25 within two years.

¶3 Represented by new counsel, Michael brought a postdisposition motion challenging the two-year period for payment of the restitution in light of the one-year duration of the dispositional order. In addition, Michael contended that the juvenile court had failed to consider his ability to pay. At the conclusion of the hearing, the court determined that Michael could work approximately twenty hours per week at a rate of \$6 per hour, producing income of \$6000 based

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² Michael also appeals from the original dispositional order. However, that order did not include a restitution figure.

³ An accompanying charge of disorderly conduct was dismissed and read in.

on fifty weeks of work per year. Based on these calculations, the court reduced the restitution order to \$6000. The court also reduced the time period for payment of the restitution to one year, bringing the order into conformity with the one-year duration of the dispositional order.

¶4 Michael appeals. We will discuss additional facts as we address the issue.

¶5 We begin with a number of preliminary observations. First, Michael's titling of his appellate issue contends that the juvenile court failed to consider his ability to pay. However, his actual argument reveals that the court did, in fact, consider his ability to pay but contends that the order is not supported by the evidence. In particular, Michael contends that the order is beyond his ability to pay. Second, although the parties sharply differ as to whether the evidence supports the restitution order, the evidence itself is not in dispute. Third, we address our standard of review. This is important because it largely governs our holding in this case. Michael's brief is silent on this point. The State refers us to WIS. STAT. § 805.17(2), which states, in part, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." But, as noted, the evidence is not in dispute, and Michael makes no challenge to the evidence.

¶6 The appropriate standard of review of a restitution order is the erroneous exercise of discretion standard. See *State v. Haase*, 2006 WI App 86, ¶5, 293 Wis. 2d 322, 716 N.W.2d 526, review denied, 2006 WI 126, ___ Wis. 2d

___, 724 N.W.2d 203.⁴ We uphold a discretionary determination if the court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. See *Covelli v. Covelli*, 2006 WI App 121, ¶13, 293 Wis. 2d 707, 718 N.W.2d 260.

¶7 We now turn to the merits. WISCONSIN STAT. § 938.34 provides in relevant part:

If the court adjudges a juvenile delinquent, the court shall enter an order deciding one or more of the dispositions of the case as provided in this section under a care and treatment plan.... In deciding the dispositions for a juvenile who is adjudicated delinquent, the court shall consider the seriousness of the act for which the juvenile is adjudicated delinquent and may consider any other delinquent act that is read into the record and dismissed at the time of the adjudication. The dispositions under this section are:

....

(5) RESTITUTION. (a) Subject to par. (c), if the juvenile is found to have committed a delinquent act that resulted in damage to the property of another ... order the juvenile to repair the damage to property or to make reasonable restitution for the damage ... if the court, after taking into consideration the well-being and needs of the victim, considers it beneficial to the well-being and behavior of the juvenile. The order shall include a finding that the juvenile alone is financially able to pay ... [and] may allow up to the date of the expiration of the order for the payment⁵

⁴ *State v. Haase*, 2006 WI App 86, 293 Wis. 2d 322, 716 N.W.2d 526, review denied, 2006 WI 126, ___ Wis. 2d ___, 724 N.W.2d 203, is an adult criminal restitution case. We see no reason in law or logic why the same standard of review should not apply in a juvenile restitution case.

⁵ WISCONSIN STAT. § 938.34(5)(c) applies to a juvenile who is under fourteen years of age. Here, Michael was fifteen years of age at the time of disposition.

¶8 Michael’s principal contention is that employment opportunities for a fifteen-year-old are limited and therefore the juvenile court’s projections about his prospective employment and earnings are too speculative. In support, he documents his unsuccessful attempts to secure employment. The juvenile court did not dispute that Michael faced an uphill task. In fact, the court noted at the dispositional hearing that there would be “substantial restitution,” prompting the court to wonder aloud whether Michael would be able to pay that amount under a consent decree. But this did not necessarily mandate a conclusion that potential employment was impossible. This is particularly so in light of other evidence which revealed that some employers in the Waukesha area hire minors as young as fourteen years of age. (Michael was fifteen at the time of the restitution hearing.) In addition, one of the potential employers contacted by Michael had told him to “check back in a week,” but Michael presented no evidence that he had done so. In short, the court was not obliged to shut down the prospect of Michael obtaining employment at this early point of the dispositional order.

¶9 Nor do we see the juvenile court’s projections that Michael could work twenty hours per week at an estimated hourly pay of \$6 dollars, producing income of \$6000 based on fifty weeks of work per year as unreasonable or beyond the pale. These were reasonable projections that the court could make from the evidence and from common sense.

¶10 Michael also points to his learning disability. But there was no evidence that the employers contacted by Michael knew of this factor, much less relied on it. Instead, the evidence simply indicated that most of these employers were not then hiring.

¶11 The ink on the dispositional order was barely dry when the juvenile court addressed the restitution question. Michael’s lack of success in finding employment did not mean that the prospect of restitution was foreclosed as a matter of law. When an offender is able to work but is not currently employed, a trial court will necessarily have to make reasonable projections as to prospective employment and wages. That was the situation in this case. We find none of the juvenile court’s projections to be unreasonable or based on rank speculation.

¶12 We also take note that WIS. STAT. § 938.34 requires the juvenile court to consider, among other factors, “the seriousness of the act for which the juvenile is adjudicated delinquent” when deciding the appropriate disposition. In addition, § 938.34(5)(a) requires that when addressing restitution, the court must consider “the well-being and needs of the victim” and whether restitution is “beneficial to the well-being and behavior of the juvenile.” The evidence at the restitution hearing demonstrated that the damage to the victim’s property was much more than the product of a teenage prank. To the contrary, the conduct completely demolished the windows and cab portion of a log hauler truck—a piece of heavy equipment that the victim used in his business. Photographic evidence supported the victim’s claim of damage. As a result of the damage, the equipment was not useable, and the victim had to rent replacement equipment to do the work. In addition, the victim lost the income produced by his occasional rental of the equipment to others. Finally, the damage was not covered under the “prorated” insurance coverage carried by the victim.⁶

⁶ The victim explained that while he had insurance coverage for the vehicle, the coverage was “prorated” to apply only to those seasonable periods of time when the vehicle was licensed for highway travel. The damage in this case occurred when the equipment was not licensed for such travel.

¶13 All of these facts demonstrated the “seriousness of the act” for which Michael had been found delinquent and they support the inclusion of a restitution order as part of the dispositional order pursuant to WIS. STAT. § 938.34. These same facts reflect the juvenile court’s concern for the “well-being and needs of the victim” and the necessity for the court to address the “behavior of the juvenile” when ordering restitution pursuant to § 938.34(5)(a).

¶14 We also observe that restitution is a matter over which the juvenile court has continuing jurisdiction during the term of the dispositional order or any extensions thereof. *See* WIS. STAT. § 936.363 (governing revision of dispositional orders) and WIS. STAT. § 938.365 (governing extension of dispositional orders). If the court’s reasonable projections under the current order do not come to pass, the court is free to modify the restitution order as future circumstances may require.

¶15 We conclude by returning to our standard of review. As noted, the question of restitution is addressed to the juvenile court’s discretion. *See Haase*, 293 Wis. 2d 322, ¶5. The question for us as a reviewing court is not how we would have decided the question in the first instance; rather, the question is whether the juvenile court’s conclusion is one that a reasonable judge could have reached. *See State v. Jeske*, 197 Wis. 2d 905, 912, 541 N.W.2d 225 (Ct. App. 1995). Thus, discretion is sometimes described as a trial court’s “limited right to be wrong ... without incurring reversal.” *Id.* at 913 (citation omitted).

¶16 This case falls under this rubric. Another court deciding this case in the first instance might have set Michael’s restitution obligation at a lower amount. But, as our analysis indicates, we cannot say that the juvenile court’s ruling was one that a reasonable judge could not make under the evidence. Even if

we assume that the court's restitution order is close to the edge of the discretionary spectrum, we cannot say it is over the edge.

By the Court.—Orders affirmed.

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