COURT OF APPEALS
DECISION
DATED AND FILED

December 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1457 **Cir. Ct. No. 01 JV 112**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

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

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHAEL L., JR.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JOSEPH R. WALL, Judge. *Affirmed.*

¶1 FINE, J. Michael L., Jr., appeals from a dispositional order adjudicating him delinquent for having violated WIS. STAT. § 943.23(4m) by intentionally accompanying, as a passenger, a person who drove a stolen car without the owner's consent. Michael L. also appeals the trial court's order

denying his motion for post-adjudication relief. His only claim of trial-court error is that the trial court should not have ordered him to pay restitution for damage to the car after he got in it. We affirm.

I.

¶2 The State originally charged Michael L. with driving the stolen car without the owner's consent, a felony. *See* WIS. STAT. § 943.23(3). The case was plea bargained to the misdemeanor charge of violating WIS. STAT. § 943.23(4m).[1] After taking Michael L.'s plea to the reduced charge, the trial court placed Michael L. on probation, as the parties jointly requested. The trial court also ordered Michael L. to pay $2,075 in restitution, which it fixed as damage to the car after Michael L. got into it. The only aspect of the adjudication order and the order denying Michael L.'s motion for post-adjudication relief that Michael L. challenges on appeal is whether the trial court could lawfully impose an order for restitution for damage he alleges that he did not cause.[2]

[1] In its well-written decision denying Michael L.'s motion for post-adjudication relief, the trial court refers to the State's request that the charge be amended from the felony under WIS. STAT. § 943.23(3) to the misdemeanor under WIS. STAT. § 943.23(4m) as an "apparent plea bargain." Yet, when the parties appeared before the trial court for what was scheduled to be a bench trial, the trial court said: "It looks like the parties have entered into a plea agreement." Michael L.'s lawyer responded: "Yes, Your Honor." The plea bargain was real, not "apparent."

[2] The parties have dealt with this case under the assumption that Michael L. was only a passenger and never drove the car. Thus, as the trial court notes in its written decision denying Michael L.'s motion for post-adjudication relief, Michael L.'s lawyer told the trial court at the plea hearing that "if [Michael L.]'s only the passenger, it's not really fair to make him responsible for the damage by the other people who were, say, operating the vehicle." The trial court's written decision characterizes this argument as "a bit opportunistic." The trial court explained:

(continued)

II.

¶3 WISCONSIN STAT. § 938.34(5)(a) provides, as material here, that a trial court may, "if the juvenile is found to have committed a delinquent act which has resulted in damage to the property of another ... order the juvenile to ... make reasonable restitution for the damage." A trial court's assessment of restitution is within its discretion; whether a restitution order comports with the statute is, however, subject to our *de novo* review. ***State v. Canady***, 2000 WI App 87, ¶6, 234 Wis. 2d 261, 266, 610 N.W.2d 147, 149; ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 233, 568 N.W.2d 31, 34 (Ct. App. 1997) (application of statute is a question of law). *But see* ***Canady***, 2000 WI App 87 at ¶12, 234 Wis. 2d at 268,

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> At his May 29, 2001 detention hearing[, Michael] L.'s counsel stated to the presiding judge that "my client indicates to me that he didn't learn that the vehicle was stolen until after he was finished driving it." At the April 22, 2002 motion hearing [on Michael L.'s motion for post-adjudication relief], the Assistant District Attorney pointed to the police reports of the incident in which "the juvenile admits that he, in fact, was driving the car and that he tried to make a turn at one point, [and] slid in the mud into a tree." Unfortunately, this information was unavailable to the Court at the restitution hearing. As such, this Court's Decision and Order will be limited to an analysis of [Michael] L.'s liability as a passenger.

(All but the penultimate bracketing added, record references omitted.) The trial court's comments are puzzling. First, the delinquency petition, which is the charging document, quoted Michael L. as admitting that he drove the car, but that he denied crashing it. Second, the police reports referenced by the trial court are attached to the delinquency petition, as are other police reports where Michael L. admitted driving the car that night, including one where he said that he was the last one to drive the car. Perhaps if the trial court had reviewed the delinquency petition and the attached police reports it would not have accepted the plea-bargained reduction proffered by the parties, and the issue presented by this appeal of whether a "mere" passenger can be held liable in a restitution order for the acts of the driver under these circumstances would have been avoided. It is, of course, the trial court's responsibility to ensure that any prosecutorial request to dismiss a charge or reduce its severity is in the public interest; trial judges in Wisconsin are not (or should not be) rubber stamps who automatically validate plea-bargained deals. *See* ***State v. Kenyon***, 85 Wis. 2d 36, 46–47, 270 N.W.2d 160, 165 (1978).

610 N.W.2d at 150 (in trial court's discretion whether there is sufficient nexus between the defendant's criminal conduct and damage for which restitution is ordered). Although Michael L. does not challenge the amount of the restitution ordered, he argues that he is not responsible because as a passenger he did nothing that "resulted in damage" to the car. We disagree.

¶4 As Michael L. points out, the "resulted in" language in WIS. STAT. § 938.34(5)(a) is also found in the statute that requires courts to order that restitution be paid by adults convicted of crimes. WIS. STAT. § 973.20(1r) & (2) (trial court "shall order the defendant to make full or partial restitution ... [i]f a crime considered at sentencing resulted in damage to or loss or destruction of property."). Thus, cases applying the "crime considered at sentencing resulted in damage" language in § 973.20(2) can illumine our inquiry.

¶5 "Before restitution can be ordered" under WIS. STAT. § 973.20(2) there must be "a causal nexus" between the "crime considered at sentencing" and the damage. ***Canady***, 2000 WI App 87 at ¶9, 234 Wis. 2d at 267, 610 N.W.2d at 149. "In proving causation, a victim must show that the defendant's criminal activity was a 'substantial factor' in causing damage. The defendant's actions must be the 'precipitating cause of the injury' and the harm must have resulted from 'the natural consequence[s] of the actions.'" ***Id.***, 2000 WI App 87 at ¶9, 234 Wis. 2d at 267, 610 N.W.2d at 150 (quoted sources omitted).

¶6 ***Canady*** upheld a restitution order for damage caused by a police officer attempting to take Canady, who was charged with both burglary and resisting arrest, into custody. ***Id.***, 2000 WI App 87 at ¶¶11–12, 234 Wis. 2d at 268–269, 610 N.W.2d at 150. A police officer arresting Canady thought that a pry bar in Canady's jacket could be used as a weapon and threw it out of Canady's reach; the

pry bar struck and broke a glass door-pane. ***Id.***, 2000 WI App 87 at ¶¶2, 11, 234 Wis. 2d at 265, 268, 610 N.W.2d at 148–149, 150. Upholding the trial court's order that Canady pay for the broken window, ***Canady*** noted that the requisite "'precipitating cause'" did not mean that the defendant must have caused *directly* or even "intended or expected" the damage encompassed by the restitution order; it is sufficient if the defendant's "actions were a substantial factor" in causing the damage in a "but for" sense. ***Id.***, 2000 WI App 87 at ¶¶9, 12, 234 Wis. 2d at 267, 268, 610 N.W.2d at 150 (quoted source omitted). Moreover, and of special significance here, the word "crime" as used in WIS. STAT. § 973.20(2) "'encompass[es] all facts and reasonable inferences concerning the defendant's activity related to the 'crime' for which the defendant was convicted, not just those facts necessary to support the elements of the specific charge of which the defendant was convicted.'" ***State v. Madlock***, 230 Wis. 2d 324, 333, 602 N.W.2d 104, 109 (Ct. App. 1999) (quoted source omitted, emphasis in quoted source). Thus, in ordering restitution, the sentencing court must "take[] a defendant's entire course of conduct into consideration" and not "break down the defendant's conduct into its constituent parts and ascertain whether one or more parts were a cause of the victim's damages." ***Ibid.*** (quoted source omitted).

> An offender cannot escape responsibility for restitution simply because his or her conduct did not directly cause the damage. If damage results from a criminal episode in which the defendant's conduct played only a small and isolated part, the defendant is nonetheless properly held to pay restitution on a joint and several basis. This is so, even if the defendant had no knowledge of, or complicity in, the event that resulted in the damage.

Id., 230 Wis. 2d at 336–337, 602 N.W.2d at 110.

¶7 As the trial court here noted, even accepting what the trial court called Michael L.'s "opportunistic argument" (see footnote two, above) that he

was only a passenger, Michael L. willingly joined with the others in what the trial court characterized as a "joyride":

> It is undisputed that [Michael] L. was in a stolen car which crashed and was completely destroyed while he was in it. He knew the car was stolen when he entered the vehicle. In a stolen car case, the law criminalizes the conduct of the driver and all passengers. See Sec. 943.23(3) & (4m). Why then, should there be a distinction in assessing responsibility for the damage to the vehicle resulting from the "joyride?" In a "joyride" of a stolen vehicle, outside of seating assignments, there is little difference between the driver and his willing passengers. Necessarily, only *one person* can drive the car - the rest *must* be passengers. However, this physical limitation does not create a legal distinction regarding the overriding intent and resultant responsibility of the various actors. The intent, the agreement, the excitement and the rush, is to ride in the stolen car. How then can one logically excuse passengers from liability, and thus responsibility for damage, when they are willingly involved in a joint course of criminal conduct with the driver?

(Emphasis by the trial court.) Under ***Madlock***'s recognition that joint and several liability is appropriate even if the defendant subject to the restitution order "played only a small and isolated part" or, indeed, had "no complicity" in the event that caused damages, the answer to the trial court's rhetorical question is that a passenger in the joyride situation is not relieved of his or her liability for damage resulting from the joyride merely because of his or her fortuitous status as a passenger.

By the Court.—Orders affirmed.[3]

[3] In an undeveloped four-sentence "argument," the State contends that this appeal is moot because Michael L.'s term of juvenile probation expired on September 26, 2002. WIS. STAT. § 895.035(2m)(a) provides a mechanism to collect restitution from a juvenile who does not pay during the term of his or her probation. The case is not moot. Counsel for the State is admonished to fully research "arguments" before tossing them willy-nilly into a brief.

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