

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2016AP1264CR

STATE OF WISCONSIN,

Plaintiff- Respondent,

v.

JASON NAPIWOCKI,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A RESTITUTION
ORDER AND POST-CONVICTION ORDER ENTERED IN
THE CIRCUIT COURT FOR PORTAGE COUNTY

**BRIEF OF PLAINTIFF-RESPONDENT STATE OF
WISCONSIN**

CASS COUSINS
Assistant District Attorney
State Bar # 1079769

Attorney of Plaintiff-
Respondent

Portage County District Attorney's Office
1516 Church St.
Stevens Point, Wisconsin 54481
(715) 346-1300
(715) 346-1236
cass.cousins@da.wi.gov

TABLE OF CONTENTS

STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
ARGUMENT	1
I. The Circuit Court did not abuse its discretion in making is restitution order in the amount of \$51,184.50.....	1
A. Standard of Review.	Error! Bookmark not defined.
B. Applicable Law.	Error! Bookmark not defined.
C. The trial court’s restitution order was based upon a logical interpretation of the facts applied to the correct legal standard..	Error! Bookmark not defined.
CONCLUSION	3
CERTIFICATION	5
CERTIFICATE OF COMPLIANCE WITH WIS. STAT § (RULE) 809.19(12)	5

TABLE OF AUTHORITIES

Wisconsin Cases

<i>State v. Canady</i> , 2000 WI App 87, ¶ 6, 234 Wis.2d 261, 610 N.W.2d 147.	1
<i>State v. Haase</i> , 206 WI App 86, ¶ 5, 293 Wis. 2d 322.	1
<i>State v. Madlock</i> , 230 Wis. 2d 324, 329-37, 602 N.W.2d 104 (Ct. App. 1999).....	1
<i>State v. Kennedy</i> , 190 Wis. 2d 252, 258, 528 N.W.2d 9 (Ct. App. 1994)	1
<i>State v. Anderson</i> , 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997)	1
<i>Hartung v. Hartung</i> , 102 Wis. 2d. 58, 306 N.W.2d 16 (1981)	2
<i>State v. Longmire</i> , 272 Wis. 2d 759, 681 N.W.2d 534 (Ct. App. 2004)	2 – 3

Wisconsin Statutes

WIS. STAT. § 973.20(2).....	2 – 3
WIS. STAT. § 973.20(13).....	2
WIS. STAT. § 973.20(14).....	2

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument of this court's opinion. It is not warranted as the issue on appeal can be resolved on the basis of well-established authority and argument fully presented in the parties' briefs.

ARGUMENT

I. The Circuit Court did not abuse its discretion in making its restitution order in the amount of \$51,184.50.

A. Standard of Review.

Mr. Napiwocki's challenge to the sufficiency of the court's explanation for restitution order is reviewed under the erroneous exercise of discretion standard. *State v. Haase*, 206 WI App 86, ¶ 5, 293 Wis. 2d 322. An order should be reversed "only if the [trial] court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts." *State v. Canady*, 2000 WI App 87, ¶ 6, 234 Wis.2d 261, 610 N.W.2d 147. The case law does not impose a requirement that the court explicitly or specifically explain its order in an in depth manner, but rather there must be some basis for the decision.

B. Applicable Law.

Restitution is intended to compensate the victim of a crime. The restitution statute "reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." *State v. Madlock*, 230 Wis. 2d 324, 329-37, 602 N.W.2d 104 (Ct. App. 1999). (quoting *State v. Kennedy*, 190 Wis. 2d 252, 258, 528 N.W.2d 9 (Ct. App. 1994)). The court should also interpret the statute "broadly and liberally in order to allow victims to recover their losses as a result of a defendant's criminal conduct." *Id.* (quoting *State v. Anderson*, 215 Wis. 2d 673, 682, 573 N.W.2d 872 (Ct. App. 1997)).

Under WIS. STAT. § 973.20(2), “[i]f a crime considered at sentencing resulted in damage to or loss or destruction of property, the restitution order may require that the defendant: Return the property to the owner or owner's designee; or (b) If return of the property under par. (a) is impossible, impractical or inadequate, pay the owner or owner's designee the reasonable repair or replacement cost or the greater of: 1. The value of the property on the date of its damage, loss or destruction; or 2. The value of the property on the date of sentencing, less the value of any part of the property returned, as of the date of its return. The value of retail merchandise shall be its retail value.”

C. The trial court’s restitution order was based upon a logical interpretation of the facts applied to the correct legal standard.

Mr. Napiwocki’s primary concern in this matter appears to be that the restitution order does not explain its reasoning to his satisfaction. However, counsel’s reliance on *Hartung v. Hartung*, 102 Wis. 2d 58, 306 N.W.2d 16 (1981) in supporting his characterization of the abuse of discretion standard is misguided. *Hartung* dealt with a spousal maintenance order, and Wisconsin law sets forth specific factors that must be addressed and explained as part of a maintenance order. The trial court in that matter failed to comply with the legal requirement and so the Wisconsin Supreme Court correctly determined that it had abused its discretion. However, WIS. STAT. § 973.20 imposes different and distinct requirements upon a hearing examiner and circuit court in the restitution hearing context. Here, the court commissioner, acting as the hearing examiner, complied with the statute, specifically WIS. STAT. § 973.20(13) and (14), in conducting the hearing and submitting the record and proposed findings of fact and law to the circuit court. Simply put, Mr. Napiwocki, disagreeing with the court’s ultimate restitution, seeks to apply requirements on the court that do not have a legal basis. The proposes findings of fact and law, while not lengthy, provide sufficient information to the circuit court for its ultimate order upon review of the proposal and record.

Regarding the specific merits of the claim, of particular note is Mr. Napiwocki's claim that the hearing examiner failed to consider his labor and his assistant's labor in determining a potential offset for restitution. Counsel cites *State v. Longmire*, 272 Wis. 2d 759, 681 N.W.2d 534 (Ct. App. 2004) to support this argument. This case is misapplied here, and should be limited in its holding to actual expenses that a defendant made to partially complete the work that was the basis. Labor is different, and indeed, if the court were to follow the defendant's logic, depending on the number of hours claimed, the restitution could be offset entirely and the defendant would own nothing. Such an outcome, where there was theft, fraud, failure to comply with contract construction contract requirements, and work done to the residence such that it was incomplete and partially uninhabitable, would clearly defeat the intent of the restitution statute.

Regarding Mr. Napiwocki's continuing objection to the Cooper Contracting invoices, this represents the expense to the victim to undo the damage to his residence caused by the defendant, and is clearly permissible restitution under WIS. STAT. § 973.20(2)(b) as the costs of repair.

Finally, regarding the expenses for the two permits, the dumpster rental, and the lift rental, totaling \$2,556.84, these amounts could potentially be subject to offset. However, counsel appears to concede that these were not submitted at the restitution hearing. The court's failure to consider evidence not submitted at the hearing cannot be construed as an abuse of discretion.

CONCLUSION

The sentencing court used its discretion in its restitution order as it was based upon a logical interpretation of the facts applied to the correct legal standard.

Dated this 6th day of January, 2017.

Respectfully submitted,

CASS COUSINS

Assistant District Attorney
State Bar # 1079769

Attorney of Plaintiff-
Respondent

Portage County District Attorney's Office
1516 Church St.
Stevens Point, Wisconsin 54481
(715) 346-1300
(715) 346-1236
cass.cousins@da.wi.gov

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 972 words.

Dated this 6th day of January, 2017.

Cass Cousins
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 6th day of January, 2017.

Cass Cousins
Assistant District Attorney