

State of Wisconsin  
Court of Appeals  
District IV

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Appeal No. 2016 AP 1611 - CR  
Dane County Case No. 2015 CM 883

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State of Wisconsin,  
Plaintiff-Respondent,

v.

Shaun R. Ezrow,  
Defendant-Appellant.

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**Brief of Defendant-Appellant**

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On appeal from a judgment of the Dane County Circuit Court,  
The Honorable David T. Flanagan III, presiding.

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*State v. Rouse*, 12  
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### Statutes and Rules

Wis. Stat. § 973.20 8-9, 13

### **Issues Presented for Review**

- I. Whether the circuit court properly ordered that the Defendant-Appellant pay the cost of the victim company's security system upgrade in the restitution order without a finding that the upgrade was necessary to redress valid special damages caused by Mr. Ezrow's conduct.

## **Statement of the Case**

On 17 September 2015, a jury convicted Mr. Ezrow of Theft in a Business Setting under Wis. Stat. § 943.20(1)(b) for stealing cash from the safe of N.G. (initials of the business from which the theft occurred and Mr. Ezrow's former employer, not a natural person). (R.31; App. 6.)

Regarding restitution, the State initially proposed an order in the amount of \$2,207.86. (R.52:3; App.10.) This reflected the amount of money missing from the safe, the cost of rekeying locks, and the time lost by N.G. employees investigating the case.

At the restitution hearing, however, N.G. requested an additional \$2,150.00 in compensation for improvements to their security cameras. (R.52:1-59; App.8-66.) The hearing was held 14 January 2016. (R.52; App.8.) One of N.G.'s corporate officer's, J.F., testified on direct examination regarding the security system costs:

“[Deputy District Attorney Corey Stephan]. The next thing is—the next bold heading is Walser Security. It says remove this bill of

\$2,150 from restitution. Could you explain what that is, sir?

[J.F.]. That is a bill for the moving and addition of cameras, the recoding of the security system, issuing new manager codes to everyone that comes and leaves, and also some immediate assistance the day after the crime was committed to help us retrieve data from the DVR.

Q. And you did, in fact, have a security system in place at the time of this offense was committed?

A. We did.

Q. And the immediate services that you requested from Walser, was that—was that support to try and help you investigate this offense?

A. It was.

Q. And you had talked about recoding of management key codes?

A. Yes.

Q. Was that—did the defendant have a key code for your system in this case?

A. He did.

Q. And is that similar to an actual live physical key? You had to change it so he could no longer have access to it?

A. Yes.

Q. And did you have to reissue new key codes to all of the other managers?

A. We did.

Q. And then the third thing you mentioned was repositioning of cameras?

A. Yes.

Q. And during the investigation of this case, did you learn that—well, first, let me ask you. Did you end up testifying in this case at trial?

A. I did.

Q. And did the positioning of the cameras become an issue at trial?

A. It was brought up that there were some uncovered areas.

Q. And did you, in response to this specific case, add additional cameras to supplement your current system to cover those blind spots?

A. We did.

Q. Would you have done that, had it not been for the offense the defendant committed in this case?

A. Not at this time.

Q. And would you have changed the manager key codes or have Walser come in and help you retrieve data from your security system, had it not been for the offense the defendant committed?

A. No.”

(R.52:8-10; App.15-17.)

On cross examination, however, J.F. acknowledged that the crime had not caused any damage to the cameras:

“[Attorney Jennifer Binkley]. Did you have new cameras put in?

[J.F.]. Yes, we have.

Q. Did they tell you how much each camera cost?

A. They lumped together the total cost of the cameras.

Q. Do you know how much that was?

A. Off the top of my head, anywhere between \$300 to \$400 per camera, I think.

Q. And would you say that because an employee stole money, that that hurt the cameras at all that you had that existed?

A. No.

Q. So you were alerted to your lack of security because of the crime, is that correct?

A. It exposed some weaknesses.

Q. But the crime itself did not create a security weakness, with regards to the cameras?

A. You are correct.

Q. And then you also discussed—well, in your request for restitution, in writing you said improvement, reposition and addition of cameras.



But you testified that you also spent time going over the—helping retrieve information?

A. Yes.

Q. But you don't have any idea how much that cost out of the total?

A. I did not itemize the bill.

Q. Do you have an estimate?

A. Off the top of my head, no.

Q. Do you know about how much a security camera cost in the past?

A. Didn't I just answer the question? It was \$300, \$400.

Q. Sorry, you may have.

A. Yes.

Q. How many did you get?

A. Cameras—I believe we added three or four more.

Q. So it was between \$900 to maybe \$1,600 for the cameras?

A. For the cameras. That's not counting installation, the wiring.

Q. So the bulk of this \$2,000 charge you think was for the repositioning, addition and wiring of those cameras?

A. I don't think I'm qualified to answer that. I mean, we can ask for an itemized bill from the security company.”

(R.52:17-20; App.24-27.)

The State then moved into evidence two new exhibits clarifying the Walser security charges. J.F. testified on cross examination:

[Attorney Jennifer Binkley]. Exhibit 3, that is itemized, though, isn't it?

[J.F.]. As well as it can be. It describes what it is, but it is just a stub.

Q. Because the court doesn't see it right now, can you—

A. 'Add one camera back parking lot, add one camera patio, add one camera facing back door, add power supply, relocate part room camera, relocate two bar cameras, wire, conduit, labor.'

Q. So, you didn't have cameras in the parking lot before?

A. We did not.

Q. Okay. And what would that have to do with this case?

A. Security of the building, vandalism, just—.

Q. What were the first two cameras the back?

A. Back parking lot. It's the main exit door for managers and staff. And then the front patio, which is the other main entrance that most people come and go from.

Q. Then the—keep going after those.

A. Camera facing the back door is more coverage of the office. That's where the office is located.

Q. Did you not have a camera there before?

A We did, but we added another one from another angle.

Q. Okay. Go on.

A. And power supply. Relocate party room camera to dining room exit door, just covering an exit. And relocating the two bar cameras to cover the majority of the bar room where they were before.

(R.52:25-26; App.32-33.)

Finally, the Court discussed these costs before deciding to add them to the restitution order:

“The question I had coming in here was the Walser Security bill of \$2,150, which is basically for a new security system. And it wasn't entirely clear to me—I didn't have any warning that that was the issue, but I have had a little bit of time to think about it here. And I'm looking at the case of *State v. Johnson*, 256 Wis. 2d 871, in which the security said—a new security system that was purchased for the victim by the victim's stepfather was actually an item of special damages of the victim, even though the victim didn't pay for it.

That's even less clear, at least if that's a special damage and that's a proper restitution element, if the one in *Johnson* was, this certainly is, too. So I think it's appropriate for me to make an order of restitution, or at least to consider the restitution amount to be \$4,357.86.”

(R.52:56-57; App.63-64.)

Mr. Ezrow filed a post-conviction Motion to Modify Restitution Order on 29 April 2016. (R.37.) The motion only contested the

additional \$2,150.00 ordered at the restitution hearing, not the original \$2,207.86 request. (R.37.) Specifically, the motion challenged the court's finding that the security system upgrade expenses were "special damages" under Wis. Stat. § 973.20(5) and that Mr. Ezrow's conduct was a "substantial factor" in causing those damages. (R.37.)

By order of 15 July 2016, the circuit court denied the post-conviction motion by written order, stating that the motion raises no new issues to consider. (R.41; App.69.)

## **Argument**

### **I.**

**The purchase of additional cameras, under these circumstances, is not valid "special damages" compensable through a restitution order under existing law.**

A circuit court may order that a criminal defendant pay restitution as set forth in Wis. Stat. § 973.20(5):

"(5) In any case, the restitution order may require that the defendant do one or more of the following:

(a) Pay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing.

(b) Pay an amount equal to the income lost, and reasonable out-of-pocket expenses incurred, by the person against whom a crime considered at sentencing was committed resulting from the filing of charges or cooperating in the investigation and prosecution of the crime.

(c) Reimburse any person or agency for amounts paid as rewards for information leading to the apprehension or successful prosecution of the defendant for a crime for which the defendant was convicted or to the apprehension or prosecution of the defendant for a read-in crime.

(d) If justice so requires, reimburse any insurer, surety or other person who has compensated a victim for a loss otherwise compensable under this section.”

Current law limits the circuit court's authority to order restitution in two ways. First, the statute authorizes restitution only for “special damages.” Wis. Stat. § 973.20(5)(a). Second, the victim must show that the defendant's criminal activity was a “substantial factor” in causing the claimed damages. *State v. Johnson*, 2002 WI App 166, 116, 256 Wis. 2d 871.

A loss constitutes “special damages” if it is a “readily ascertainable pecuniary expenditure attributable to the defendant's criminal conduct that could be recovered in any type of civil action, such as conversion or breach of contract.” *State v. Johnson*, 2005 WI App 201, ¶112, 287 Wis. 2d 381. In other words, restitution can only be ordered for monetary injury or damage caused by the crime.

N.G.’s security system upgrade does not constitute “special damages.” It was not a pecuniary expenditure required to redress damage caused by the crime. While the upgrade may have made solving the crime easier had it been previously installed, the upgrade was not necessary to restore the victim to its original condition.

Previous cases have upheld restitution for security system installations only because they were needed to restore a sense of security lost after a violent crime. In *State v. Johnson*, for instance, the Court of Appeals reasoned as follows:

“At the restitution hearing, J.M.K.’s stepfather testified that he purchased the home security system shortly after Johnson’s mistreatment of J.M.K. to help her feel more secure. J.M.K. testified

that Johnson was still coming around the neighborhood after the incident, even though he no longer lived with his parents. She also testified that she continued to be afraid of Johnson and that she feared that he might harm her at some point in the future. Additionally, Johnson had threatened that he would ‘get even’ with J.M.K. if she ever told anyone about the incident. From this testimony, the circuit court reasonably could have inferred that J.M.K. had lost her sense of security within her home due to Johnson's criminal acts. Accordingly, we conclude that there was sufficient testimony to establish a causal connection between Johnson's criminal conduct and the need for the security system that W.L. purchased to try to restore J.M.K.'s lost sense of security. Therefore, we conclude that the circuit court acted within its discretion in characterizing the cost of the security system as an item of J.M.K.'s special damages in this case, and we further conclude that W.L. compensated J.M.K. by paying for the system.”

2002 WI App 166, ¶ 21, 256 Wis. 2d 871, 649 N.W.2d 284.

In other words, the victim was traumatized and her “sense of security” injured due to the crime. A security system was necessary to restore that sense of security.

Restitution is intended to redress an injury, even if the injury is not physical. In *Johnson*, the crime damaged the victim's sense of security, so she needed a security system to restore it. 2002 WI

App 166, ¶ 21. In *State v. Behnke*, a sexual assault damaged the victim's sense of security, so she needed a new lock on her door to feel safe. 203 Wis. 2d 43, 60, 553 N.W.2d 265 (Ct. App. 1996). In other cases, the injury is to an object or an employee's productivity. For example, in *State v. Canady*, the defendant's resisting arrest caused an officer to accidentally break the glass on a door, so the door needed to be fixed. 2000 WI App 87, ¶ 11, 234 Wis. 2d 261. In *State v. Rouse*, the defendant's forgery caused bank employees to spend time investigating, so the bank needed compensation for the loss of productivity. 2002 WI App 107, ¶ 15, 254 Wis. 2d 761.

Each of these decisions finds an injury and a corresponding expenditure specifically designed to redress that injury. They turn on whether the defendant's conduct caused the injury.

Restitution exists to return victims to the position they were in before the defendant injured them. *State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). Restitution is only authorized to restore damage caused by a defendant's criminal actions, not to pay for an improvement in the victim's situation.



Yet an improvement, unrelated to the damage caused by the criminal conduct in this case, is exactly what N.G. will receive under the current restitution order.

Mr. Ezrow's conduct did nothing to damage existing security cameras; they were untouched on the night in question. N.G.'s choice to add and reposition security cameras was a business decision that heightened the security of the premises, putting the company in a position superior to that in which it had been before the crime.

The crime was not violent, and N.G. has not shown it needed new cameras to put employees' minds at ease. Further, the victim has the burden of proof at a restitution hearing, and N.G. did not present testimony showing that any person's sense of safety was damaged by this crime. Wis. Stat. § 973.20(14)(a). This undermines the circuit court's reliance on *Johnson*, in which the court specifically found that a security system was necessary to redress the loss of security. 2002 WI App 166, ¶ 21, 256 Wis. 2d 871, 649 N.W.2d 284.

In this case, there is no injury addressed by an upgrade to N.G.'s security system. According to J.K.'s testimony, Mr. Ezrow's conduct caused no damage to the security cameras. Rather, the business decided it would be wise to improve the system, a decision not necessitated by anything that happened in this case. In fact, Mr. Ezrow's very conviction shows that the system was sufficient to help solve the crime. When asked if he would have upgraded the security system if not for the events of this case, J.F. answered "Not at this time," implying it would have happened at some point. (R.52:10; App.17.)

### **Conclusion**

Mr. Ezrow requests that this court either (1) Reduce the restitution order by the amount of the security system upgrade, \$2,150.00 or (2) order that the circuit court hold a fact-finding hearing to determine if any additional basis exists to support including the cost of the security system upgrades in the restitution order.

Dated this 10th day of December 2016.

Respectfully submitted,

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**Rule 809.19(8)(d) Certificate**

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,676 words.

Dated this 10th day of December 2016.

Brandon Kuhl

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**Rule 809.19(12)(f) Certificate**

I hereby certify that:

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 10th day of December 2016.

Brandon Kuhl

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### **Certificate of Mailing**

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that I caused ten copies of the Brief and Appendix of Defendant-Appellant to be mailed by Priority Mail to the Wisconsin Court of Appeals, PO Box 1688, Madison WI 53701-1688, three copies to the State by Attorney Allison Cogbill, Room 3000, 215 South Hamilton, Madison WI 53703-3211, and one copy to Shaun Ezrow at 2382 Ofsthun Road, Apt. 2, Cottage Grove WI 53527.

Dated this 10th day of December 2016.

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### **Statement on Oral Argument and Publication**

Neither oral argument nor publication is warranted in this case.

The brief fully presents and develops the issues on appeal, making oral argument unnecessary. Wis. Stat. (Rule) 809.22.(2)(b).